TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 32

WILLIAM H. MECON, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, PETITIONER,

vs.

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 12, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,712)

(35,712)

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA

NOTE RE CITATION AND SERVICE

(Citation in proper form, directed to appellees, was issued Feb. 25, 1930, and on the same day service of said citation was accepted by counsel for said appellees.)

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Feb. 19, 1930

To the defendant, Fitzsimmons Drilling Company, and Hal C. Thurman, Ray Fellows, and Moss & Young, Its attorneys of record; and, Atlantic Oil Producing Company, a Corporation, and George H. Short, and Hagan & Gavin, Its attorneys of record.

Take Notice, that the plaintiff in the above entitled action appeals from the decision rendered in the above case on December 18, 1929.

Ford & Montgomery, Attorneys for Plaintiff, William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

Service of the above Notice acknowledged this 19th day of February, A. D. 1930.

H. C. Thurman, Attorney for Defendant Fitzsimmons Drilling Company. George F. Short, C. W. King, Attorneys for Defendant Atlantic Oil Producing Company.

[File endorsement omitted.]

IN DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, Plaintiff, vs. Fitzsimmons Drilling

Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, Defendants. No. 57713. "Lien claimed."

[fol. 2] AMENDED PETITION—Filed May 15, 1929

Plaintiff, after first having obtained leave of court so to do, files this as his amended petition herein.

First Cause of Action

Plaintiff, for his first cause of action against the defendants above named, and each of them, alleges and avers:

That he is the duly appointed, qualified and acting administrator of the estate of Archie Lee Smith, deceased, which deceased died intestate in the state of Oklahoma, on the 25th day of May, A. D. 1927, at or about the hour of seven o'clock, A. M. of said day, from and on account of injuries negligently inflicted upon him by the defendants, as hereinafter set out, at or about ten o'clock, P. M. on the 24th day of May, A. D. 1927, and that this suit is brought for damages for the wrongful death of said deceased, and is brought for the use and benefit of the next of kin of said deceased, and that all of the next of kin of said deceased are as follows, to-wit:

Lillian Smith, widow, age 32.

Donna G. Smith, daughter, age 6.

Welford Lee Smith, son, age 2 years.

That the plaintiff herein at the time of the filing of this petition is a resident and citizen in good faith of the state of Louisiana, having been a resident and citizen of said state for a period of more than twenty years prior to the filing of this suit.

That the corporate defendants above named, to-wit: Fitzsimmons Drilling Company and the Atlantic Oil Producing Company, and each of them, are corporations duly organized, created and existing according to law, and that the said defendants, and each of them, have an agent in Oklahoma county, state of Oklahoma, upon whom service of process can be had; that the defendant, Fitzsimmons Drilling Company, a corporation, is a resident and citizen of the state of Louisiana, and that the Atlantic Oil Producing Company is a resident and citizen of the state of Delaware

That on account of the above and foregoing facts this court has jurisdiction of the subject matter of this suit and the parties, and that said cause is not a removable cause to the Federal Court for the Western District of Oklahoma, [fol. 3] for the reason that both the plaintiff and the defendant, Fitzsimmons Drilling Company, are residents and citizens of Louisiana.

Plaintiff, for his first cause of action against the deherein at all times hereinafter mentioned were engaged in drilling a well prospecting for oil and gas in the greater Seminole Oil Field in the State of Oklahoma, the exact location of said well being to the plaintiff unknown, and plaintiff states that the said corporate defendants were drilling said well under and by virtue of a certain contract and private arrangement or agreement between them, the exact nature, terms and conditions of which are unknown to the plaintiff, but he alleges that he verily believes that the said defendant, drilling company, was an independent contractor on said well until the same had been drilled to a sufficient depth to penetrate a producing oil or gas sand, and that when said well had been drilled to a sufficient depth to penetrate an oil or gas sand, that the defendant, producing company, had authority to give orders and directions concerning the future drilling operations around said well, and that when said well had penetrated an oil and gas producing sand, then the relation between the said defendants would become that of principal and agent, instead of owner and independent contractor.

Plaintiff states that he verily believes that at the time the deceased was injured and killed, said well had been drilled to a sufficient depth to penetrate an oil and gas producing sand, and that the defendant, producing company, had interfered with the work, and had given certain orders relative to the drilling operations around said well, and that on account thereof at the time the said deceased was injured and killed, the defendant, drilling company, was the mere agent of its co-defendant, producing company, in the drilling operations around said well.

Plaintiff herein further states that within less than two hours prior to the time the deceased was injured and killed, the said drilling company by and through John C. Diver and other of its servants and agents, whose names are to the plaintiff unknown, and that one, L. H. Sharp, an em-

ployé and an agent and servant of the defendant drilling company, and other of its agents and servants whose names are to the plaintiff unknown, had been to the said drilling oil well where the deceased was employed as hereinafter [fol. 4] set out, and that the individuals above referred to were foremen and vice-principals of their respective masters, and had authority to and did direct the said deceased and the other employees who were working in, on and around the said well which was being drilled prospecting for oil and gas, as aforesaid, and that the said deceased and other employees who were working on, at and near said well were obliged to, and did conform to and obey the orders, directions and commands of the said individuals who were agents of their respective employers, defendants herein, and did actually obey the commands and orders which were given by the said Diver, Sharp, and others, and drilled the said well deeper, in pursuance of the orders and commands which had been given them by the said Diver, Sharp, and other individuals, whose names are to the plaintiff unknown.

Plaintiff further avers that the said well hereinbefore referred to, which was being drilled by the corporate defendants herein on the 24th day of May, A. D. 1927, had been drilled to a sufficient depth to penetrate a producing oil and gas sand, and that at the time the deceased was injured, and killed, as hereinafter set out, and for about a month prior thereto, the said well had been producing both oil and gas in large quantities and amounts, the said well producing natural gas in a volume and quantity in excess of three million cubic feet per day, and that the said well was spraying, flowing and producing oil at the rate of approximately two hundred barrels per day. That the said well had originally been connected up with the flow tank, but that for more than three days prior to the time the said deceased was injured and killed the said well had bee- disconnected and was not shut in, all of which was in violation of the conservation and waste laws of the State of Oklahoma.

That the said well at the time the deceased was injured had a control-head thereon, and had a short piece of pipe connected to the said control-head, which had been installed by both of the defendants herein working in conjunction with each other, and which condition had a tendency to and did cause the said oil and gas as it came out of the said well

to become confined underneath the floor of said derrick and in the cellar of said well, and without re-connecting up the said well with the flow tank that had been installed near said well, the said defendants herein, and each of them, act-
[fol. 5] ing through their respective duly authorized agents and servants to-wit: the said Diver and Sharp, and others whose names are to the plaintiff unknown, directed and instructed the said deceased and its other employees to continue working in, on and around said well, and directed and permitted the said deceased and its other employees to drill the said well deeper and to clean the same out, without it being entirely connected with the flow tank, and while the said well was making both oil and gas, as aforesaid.

That the said defendants herein on account of the above and foregoing method of doing and performing the work, to-wit, they ordered, directed and permitted the said deceased and their other employees herein to work on the said well without the same being completely and entirely connected up to and with the flow tank, when there was a safe, suitable and proper method of doing and performing the work, that of connecting the said well up to the said flow tank before ordering, directing and permitting the said deceased and its other employees to work in, on and around said well.

Plaintiff herein further states that the defendants herein, and each of them, adopted and promulgated rules and regulations for the doing and performing of said work, but that the said rules and regulations so promulgated were adopted and promulgated in a dangerous and careless manner and that the said defendants when they promulgated the said rules were negligent, for in that they should have promulgated rules and regulations requiring that no person should be directed, ordered or permitted to work in, on or about said well until the same had been entirely connected up with the flow tank.

Plaintiff further states that the said deceased on the day he was injured and killed was in the employ of the defendant drilling company as a driller on the well above referred to, but that the said deceased was subject to the orders, directions and commands of the defendant producing company as well as the drilling company, and was required to obey the orders of both defendants, and that the said deceased was on duty at the time he was injured and was

working in pursuance of orders, directions and commands which had been given to him by the said defendants, and each of them, prior to the time he was injured and killed.

Plaintiff further states that on account of the defendant's [fol. 6] failure herein only to partially connect up the said well with the flow tank and in not connecting the same up after it had been disconnected, the said oil and gas escaped from the said well and settled underneath the derrick floor and to the ground in and around the said drilling well and collected thereat in large volumes, quantities and amounts, and that about ten o'clock P. M. of said day the said oil and gas became ignited from some source or cause unknown to this plaintiff, and as a result thereof an explosion occurred, which was followed by fire, and that deceased's body was enveloped in flames, his clothing was set on fire and he was immediately severely burned and injured.

Plaintiff further states that the said deceased was severely burned on the outside of his body, and that he sucked and inhaled the flames into his throat and lungs, and he thereby became painfully, permanently and seriously injured, both internally and externally, a compete description of which is to the plaintiff unknown, but which injuries about eight or ten hours thereafter caused the said deceased to depart this life.

Plaintiff further states that the injuries and death of the said deceased were not caused or occasioned by any fault or neglect on his part, but were caused wholly, directly and proximately by and on account of the negligent acts of misfeasance and nonfeasance on the part of the said defendants, and each of them, as hereinbefore set out, and that the said negligence on the part of the said defendants, and each of them, concurred and commingled together and with each other and proximately caused deceased's injuries and death, and plaintiff further states that the acts and conduct of the defendants hereinbefore referred to also violated what is known as the Factory Act and Labor Laws of the State of Oklahoma.

Plaintiff further states that the said deceased at the time of his death was a strong, robust, healthy, able-bodied man, between thirty and thirty-five years of age, and had a life expectancy of more than thirty years. That he was employed and earning, and capable of earning from $300 to $[illegible] per month. That he was sober industrious, affection-

ate and dutiful, and had in the past contributed large sums of money to the support, health and comfort of his widow and children and had he lived would have continued to do [fol. 7] so for the remainder of his life, and that on account of his wrongful death his next of kin have sustained actual damages in the sum of One Hundred Thousand Dollars ($100,000.00), no part of which has ever been paid.

Wherefore, plaintiff prays that he have and recover a judgment against the said defendants, and each of them, for the use and benefit of the next of kin of said deceased, Archie Lee Smith, for the sum of One Hundred Thousand Dollars ($100,000.00) on his first cause of action herein.

Second Cause of Action

Plaintiff herein for a further and second cause of action against the said defendants, and each of them, alleges and avers:

That he herein adopts all of the allegations of his said first cause of action against the defendants which are set out herein, and makes said allegations a part of his second cause of action the same as if all of said allegations were herein again set out and re-alleged, and in addition thereto, plaintiff avers that the said deceased, Archie Lee Smith, who was injured about [redacted] o'clock P. M. on the 24th day of May, 1927, remained alive until about seven o'clock A. M. on the 25th day of May, 1927, and plaintiff further states that the said deceased was severally burned on the outside of his body, and that he sucked and inhaled the flames into his throat and lungs and he thereby became painfully, permanently and seriously injured, both internally and externally, a complete description of which is to the plaintiff unknown, but that the said deceased was conscious from the time he was injured until he died, and on account of his injuries suffered excruciating bodily pain and mental anguish from the time he was injured until he died, and on account thereof the deceased sustained actual damages in the sum of Three Thousand Dollars ($3,000.00), no part of which was paid to the deceased during his lifetime nor has any portion thereof ever been paid to this plaintiff.

Wherefore, Plaintiff prays that he have and recover a judgment against the said defendants, and each of them, on

his second cause of action herein for the sum of $3,000.00 for the use and benefit of the estate of the said deceased.

Wherefore, Plaintiff prays that he have and recover a judgment against the said defendants, and each of them, [fol. 8] on his first and second causes of action herein in the sum of $103,000.00; that he have and recover the costs of this action and all other relief.

A. H. Meyer and Ford & Montgomery, Attorneys for Plaintiff.

[File endorsement omitted.]

IN DISTRICT COURT OF OKLAHOMA COUNTY

NOTICE OF PETITION AND BOND FOR ORDER OF REMOVAL—Filed June 4, 1929

To William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, and Roy F. Ford and A. H. Meyer, his attorneys — record:

Please take notice that the defendants, Fitzsimmons Drilling Company, Incorporated, and Atlantic Oil Producing Company will, on the 4th day of June, 1929, at 1:30 o'clock P. M. file in the District Court in and for Oklahoma County, State of Oklahoma, their petition and bond for removal, copies of which are herewith served on you, and will as soon thereafter as counsel can be heard, present to said Court, and a Judge thereof, said petition and bond and request an order removing said cause to the District Court of the United States for the Western District of Oklahoma, in accordance with the prayer of said petition.

Dated this 3rd day of June, 1929.

H. C. Thurman, George F. Short, Attorneys for Defendants, Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company.

Service of copy of the above notice, with copies of petition and bond for removal is hereby acknowledged this 3rd day of June, 1929, at 11:50 o'clock A. M.

Ford & Montgomery and A. H. Meyer, Attorneys of Record for William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

[fol. 9] [File endorsement omitted.]

In District Court of Oklahoma County

Petition of Defendants, Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company, for Removal of Cause to the District Court of the United States for the Western District of Oklahoma—Filed June 4, 1929

To the Honorable District Court within and for Oklahoma County, State of Oklahoma:

Come now your petitioners, Fitzsimmons Drilling Company, incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, defendants herein, and for the purpose set out in this petition only, and reserving to themselves, and each of them, any and all objections to the filing of plaintiff's amended petition herein, and all objections to the sufficiency thereof, respectfully represent to this Honorable Court.

I

That on or about the 14th day of May, 1929, the above named plaintiff filed in the District Court within and for Oklahoma County, State of Oklahoma, his amended petition naming Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, as defendants therein, and praying for judgment on his first cause of action for the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of Lillian Smith, also known and referred to as Mrs. A. L. Smith, the widow of A. L. Smith, deceased, and Donna G. Smith and Welford Lee Smith, children of A. L. Smith, deceased, they being the next of kin of said A. L. Smith, deceased, as damages sustained by said next of kin by reason of the alleged wrongful death of A. L. Smith, deceased, and praying in plaintiff's second cause of action judgment against said defendants for Three Thousand ($3,000.00) Dollars for the use and benefit of the estate of A. L. Smith, deceased, for and on account of the conscious pain and suffering of A. L. Smith, between the time of injuries alleged to have been caused by the negligence of the defendants and the time of the death of A. L. Smith, alleged to have resulted from such injuries.

[fol. 10] Petitioners further aver and allege that prior to the filing of said amended petition, the plaintiff had not in-

this action claimed, or ask [asked] for judgment for an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that by filing said amended petition, the plaintiff for the first time in this action alleged damages in excess of the sum of Three Thousand ($3,000.00) Dollars, and for the first time in this action sought a judgment against the defendants for an amount in excess of Three Thousand ($3,000.00) Dollars, and in said amended petition, the plaintiff set out and alleged a cause of action for the recovery of the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of the widow and children alleged to be the next of kin of A. L. Smith, deceased, which is a new, different, distinct and additional cause of action and not mentioned or referred to in plaintiff's original petition, in this action, and upon the filing of said amended petition, this action first became a controversy involving an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and an action subject to removal to the Court of the United States under the Constitution of the United States and Acts of Congress, pursuant thereto, and that said amended petition was filed in this action with the wrongful, and fraudulent purpose of ousting the Courts of the United States of jurisdiction to hear, try and determine the controversy existing between the plaintiff and these defendants, as set out in plaintiff's first cause of action in said amended petition, as heretofore adjudicated as between the parties hereto, as hereinafter set out, and with the wrongful and fraudulent purpose, on the part of the plaintiff, to deprive the defendants, your petitioners herein, of the rights and privileges guaranteed to them by the Constitution and laws of the United States to have this controversy heard, tried and determined by the District Court of the United States, all as hereinafter set out.

II

Petitioners aver and allege that, under the statutes of the State of Oklahoma, they, as defendants in said action, have twenty (30) [20] days from the filing of said amended petition in which to appear, plead, demur to, or answer said amended petition, and that under the order of this Honorable Court, permitting the filing of said amended [fol. 11] petition over the objection of these defendants,

and petitioners, they have twenty (20) days from May 15, 1929 in which to appear and plead, or demur to, or answer said amended petition, and that the time so allowed the defendants under the practice and laws of the State of Oklahoma, and rules and order of this Court, for these petitioners to appear and plead, or demur to, or answer said amended petition has not elapsed.

III

Your petitioners aver and allege that this is a controversy between citizens of different states, and that more than Three Thousand ($3,000.00) Dollars, exclusive of interest and costs is involved herein, and that said action is brought by the plaintiff for the alleged negligence of the defendants resulting in personal injuries to A. L. Smith, also known and referred to herein as Archie Lee Smtih, and for the death of said A. L. Smith alleged therefore resulted from such injuries, and in plaintiff's first cause of action it is alleged that by reason of the death of A. L. Smith, his widow, and children, being the next of kin, have been damaged in the sum of One Hundred Thousand ($100,000.00) Dollars, and praying therein for judgment against defendants, these petitioners for the benefit of said next of kin for the sum of One Hundred Thousand ($100,000.00) Dollars, and in plaintiff's second cause of action it is alleged that the said A. L. Smith, between the time of his injuries and death endured conscious pain and suffering and damage in the amount of Three Thousand ($3,000.00) Dollars, and in said cause of action the plaintiff prays judgment against defendants, these petitioners, for the benefit of the estate of A. L. Smith, deceased, in the sum of Three Thousand ($3,000.00) Dollars and costs of the action, and that this controversy therefore involves the sum of One Hundred and Three Thousand ($103,000.00) Dollars, exclusive of interest and costs.

Your petitioners further aver and allege that in this action there is a controversy between citizens and residents of different states, in this, to-wit: That the defendant and petitioner, Fitzsimmons Drilling Company, Incorporated, is a corporation duly organized, created and existing under the laws of the State of Louisiana, with its principal place of business at Shreveport in said state, and

that it was at the commencement of this action, at all times since, and is now a resident and citizen of the State of [fol.12] Louisiana; that the defendant, Atlantic Oil Producing Company, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware with its principal place of business at Wilmington in said state, and was at the commencement of this action, ever since and now is a resident and citizen of the State of Delaware; that while it is alleged in plaintiff's amended petition that the plaintiff is a resident and citizen of the State of Louisiana, the first alleged cause of action set out said amended petition, and being for the first time alleged, asserted and claimed in this action, and in an amount such as would give to the Courts of the United States jurisdiction of removal, is for the sole use and benefit of Lillian Smith, who is the same person as Mrs. A. L. Smith, referred to and mentioned herein, and the widow of A. L. Smith, deceased, and Donna G. Smith and Welford Lee Smith, children of A. L. Smith, deceased, and that the said Lillian Smith, Donna G. Smith, and Welford Lee Smith were each and all at the time mentioned in said amended petition, at the time of the commencement of this action, at all times since, and at the time of the filing of said amended petition, at the time of the commencement of this action, at all times since, and at the time of the filing of said amended petition, and now are actual residents and citizens of the State of Oklahoma, with their home in the town of Cleveland in Pawnee County in said state, and that said, A. L. Smith, deceased, mentioned and referred to in said amended petition, and in this petition as Archie Lee Smith, was for many years prior to his death, an actual resident and citizen of the State of Oklahoma, with his home at Cleveland in Pawnee County in said State, and that the alleged causes of action set out in plaintiff's amended petition arose and accrued, according to the allegations of said amended petition, wholly within the State of Oklahoma.

Petitioners further aver and allege that according to the allegations of plaintiff's amended petition, said A. L. Smith was injured in an explosion that occurred in Seminole County, Oklahoma about 10:00 o'clock P. M. May 24,

1927, and died as a result of said injuries about 7:00 o'clock A. M. May 25, 1927.

Petitioners further allege and aver that on June 28, 1927, Mrs. A. L. Smith filed in the County Court in and for Cleveland County, State of Oklahoma, her petition for [fol. 13] letters of administration of the estate of Archie Lee Smith, deceased, alleging that at the time of his death, Archie Lee Smith was a resident of Pawnee County, Oklahoma, that Mrs. A. L. Smith was the widow, and Donna Gail Smith was the daughter, and Welford Lee Smith was the son, and the three (3) constituted the sole heirs-at-law of Archie Lee Smith, deceased, and were residents of Pawnee County, Oklahoma. On August 1, 1927, by order of said Court, Mrs. A. L. Smith was appointed administratrix of the estate of Archie Lee Smith, deceased, and thereupon qualified by giving bond and taking oath, and on the same day letters of administration were issued to her by said County Court.

On October 27, 1927, an action was commenced in the District Court of Oklahoma County, State of Oklahoma, being Case Number 54,159 in said Court, wherein Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, was plaintiff, and Fitzsimmons Drilling Company, incorporated, a corporation, Atlantic Oil Producing Company, a corporation, John C. Diver, Glenn Kahle and William A. Snyder, were defendants, that in said action it was alleged that the plaintiff was the duly appointed qualified, and acting administratrix of the estate of A. L. Smith, deceased, who died in the State of Oklahoma on May 25, 1927 at about 7:00 o'clock A. M. on account of injuries, negligently inflicted upon him by the defendants at or about 10:00 o'clock P. M. on May 24, 1927, and that said suit was brought for damages for the wrongful death of the deceased and for the use and benefit of the next of kin of the deceased, and that all of the next of kin were Lillian Smith, age thirty-two (32), widow, Donna G. Smith, daughter, age six (6), Welford Lee Smith, son, age sixteen (16) months, that the plaintiff was a resident and citizen in good faith of the State of Oklahoma, that the deceased on May 24, 1927, with other employees of the corporate defendants, were engaged in work on a well being drilled by the corporate defendants in

Seminole County, Oklahoma, and on said date at about 10:00 o'clock P. M. A. L. Smith was injured and burned in an explosion and fire at said drilling well, resulting from negligence of the defendants in failing to connect said well with flow tank, on account of which failure oil and gas escaped from the well and settled underneath the derrick floor, and to the ground around said drilling well and became ignited, causing such explosion, and that the death [fol. 14] of Archie Lee Smith resulted from such injuries and on account thereof his widow and children were damaged in the sum of One Hundred Thoursand [Thousand] ($100,000.00) Dollars, and praying for judgment against the above named defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, and the costs of the action. For a more detailed statement of the allegations of said petition, reference is hereby made to the plaintiff's petition, which is on file as part of the records of this Court in the cause hereinabove mentioned, and as shown in the certified [certified] transcript of the records of said case on file in the United States District Court for the Western District of Oklahoma, under docket Number 3686-Law, as hereinafter set out. On November 26, 1927 notice, bond, and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company for removal to the District Court of the United States for the Western District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and the petitioning defendants, and the fraudulent joinder of the individual defendants residing in Oklahoma, were filed in said Court, and on November 28, 1927 this Court in said action made and entered an order for the removal of said cause Number 54,159 to the District Court of the United States for the Western District of the State of Oklahoma. On December 15, 1927, a duly certified transcript of the record in said case was filed in the District Court of the United States for the Western District of Oklahoma and docketed as Case Number 3686-law. On December 29, 1927, the plaintiff in said action, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, filed her motion in said United States District Court to remand said cause to the District Court of Oklahoma County, State of Oklahoma. On June 6, 1928, after a full hearing and

consideration of said motion, said United States District Court, finding that it had full and complete jurisdiction of said action, made and entered its order overruling said motion to remand and on July 6, 1928, the plaintiff in said action filed a dismissal thereof.

Petitioners further aver and allege that on July 8, 1928, that being the same day on which the plaintiff dismissed said former action in said United States District Court, the said Mrs. A. L. Smith, or Lillian Smith, administratrix of [fol. 15] the estate of A. L. Smith, deceased, as plaintiff, commenced the second action in the District Court of Oklahoma County, State of Oklahoma, naming as defendants, the same identical persons and corporations as were named as defendants in the former suit, said second case being entered and docketed in said District Court of Oklahoma County, as case Number 56,098. In the plaintiff's petition in said case Number 56,098 the materials alleged are the same as the plaintiff's allegations in said former suit, and the recovery sought was identically the same, and for the benefit of the same parties. For a more detailed statement of such allegations, petitioners refer to the petition in said case Number 56,098 now on file and among the records of the District Court of Oklahoma County, and also shown by the certified transcript of the record of said case on file in the District Court of the United States for the Western District of Oklahoma under docket Number 3819-law, as hereinafter set out. On August 4, 1928, notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company to remove said cause to the United States District Court for the Western District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and said petitioners, and a fraudulent joinder of the individual defendants, residents of the State of Oklahoma were filed. On August 6, 1928, the District Court of Oklahoma County, State of Oklahoma, on consideration of said petition for removal made and entered its order for the removal of said cause as prayed. On August 22, 1928 a certified transcript of the record in said case was filed in the District Court of the United States for the Western District of the State of Oklahoma, and docketed in said Court as case Number 3819-law. On August 28, 1928 the plaintiff in action, Mrs. A. L. Smith, or Lillian Smith, ad-

ministratrix of the estate of A. L. Smith, deceased, filed her motion to remand said cause to the District Court of Oklahoma County, State of Oklahoma. On November 15, 1928, after the hearing and consideration of said motion to remand, the said United States District Court finding that said Court had full and complete jurisdiction of said cause, overruled plaintiff's motion to remand, and on December 6, 1928 the plaintiff to nullify the order of said United States District Court and to avoid the jurisdiction of said Court dismissed said action.

[fol. 16] Petitioners further aver and allege that on July 9, 1928 in disregard and defiance of the order of said United States District Court for the Western District of Oklahoma, determining and adjudicating that said Court had jurisdiction of said cause docketed in said Court as case Number 3686-law, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, as plaintiff, commenced another action in the District Court of Tulsa County, State of Oklahoma against the same identical defendants named in the two former suits, in which she alleged the same material facts, prayed for same recovery and for the benefit of the same next of kin, as alleged and sought in her two former petitions. For a more detailed statement of the allegations in said petition, reference is hereby made to a copy of the petition, which is attached hereto, marked Exhibit "A" and made a part of this petition, and the said action so commenced was entered and docketed in said District Court of Tulsa County, as case Number 43,033. On August 6, 1928 notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, for removal of said cause to the District Court of the United States for the Northern District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and petitioners, and the fraudulent joinder of the individual defendants, who were residents of Oklahoma, were filed. On August 9, 1928, upon a consideration of said notice, bond and petition for removal, the District Court of Tulsa County, State of Oklahoma, made and entered its order for the removal of said cause to said United States District Court as prayed. On the 5th day of Sept., 1928 a certified transcript of the record of said case was filed in the District Court of the United States for the

Northern District of Oklahoma, and was entered and docketed as case Number 730-law. On the 12th day of Sept., 1928 the plaintiff filed in said United States District Court her motion to remand said cause to the District Court of Tulsa County. On December 13, 1928, upon the hearing and consideration of said motion to remand, the United States District Court for the Northern District of Oklahoma found that said Court had full and complete jurisdiction of said cause and made and entered its order overruling the plaintiff's motion to remand, and on December 13, 1928, the plaintiff, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, dismissed said action, [fol. 17] having previously, on December 10, 1928, in order to avoid and nullify and render ineffectual the two former adjudications of the District Court of the United States for the Western District of Oklahoma, and the anticipated adjudication of the District Court of the United States for the Northern District of Oklahoma, to the effect that said United States District Courts had full and complete jurisdiction of said causes hereinabove mentioned, and with the wrongful and fraudulent purpose of depriving these petitioners, who were defendants in each of said actions, of the rights and privileges guaranteed to them by the Constitution and laws of the United States, and after she had purported to act as administratrix of the estate of A. L. Smith, deceased for a year and a half, fraudulently and w-ongfully filed in the County Court of Pawnee County, Oklahoma, and in probate case Number 143, in which the administration of the estate of A. L. Smith, deceased, was pending, an instrument, designating "resignation of administratrix and request for appointment of William H. Mecom, as succeeding administ-ator," in which she purported to resign as administratrix of the estate of A. L. Smith, deceased, and requested the appointment of William H. Mecom, an attorney-at-law of Columbia, Louisiana as her successor, and on the same day the said William H. Mecom, by Roy F. Ford, as attorney, who is the same attorney who had represented and appeared for Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, in each of the three (3) actions filed

against these petitioners, and hereinabove specifically mentioned, filed his petition for letters of administration of the estate of Archie Lee Smith, deceased, who was the same person as A. L. Smith, alleging that he, the said William H. Mecom was a resident of Columbia, Louisiana, and representing that he was a friend of the family of said deceased, A. L. Smith, or Archie Lee Smith, and on the same day, to-wit: December 10, 1928, Charles Besly, County Judge of Pawnee County, Oklahoma, and Judge of the County Court in and for Pawnee County, Oklahoma, made and entered an order appointing the said William E. Mecom of Columbia, Louisiana as administrator of the estate of said Archie Lee Smith, or A. L. Smith, reciting "and his widow Lillian Smith having resigned as administratrix and requesting the appointment of William H. Mecom," and letters of administration of the estate of Archie Lee Smith, [fol. 18] or A. L. Smith, were issued to said William H. Mecom, pursuant to said resignation and request and said order of appointment and on December 10, 1928. Petitioners further aver and allege that the said resignation of Mrs. A. L. Smith, or Lillian Smith, who are one and the same person, a resident of Pawnee County, State of Oklahoma, as administratrix of the estate of A. L. Smith, deceased, and her request for the appointment of William H. Mecom, attorney-at-law of Columbia, in the State of Louisiana, which state is the residence and domicile of the petitioner, Fitzsimmons Drilling Company, incorporated, and the procuring of the appointment of the said William H. Mecom, as administrator of the estate of Archie Lee Smith, or A. L. Smith, deceased, was for the wrongful and fraudulent purpose of instituting another and further action on the same identical cause of action which had been started and alleged in the three (3) suits already filed, in such manner as to prevent these petitioners from exercising and availing themselves of the rights and privileges guaranteed to them by the Constitution and laws of the United States to have the action against them to recover damages for the benefit of the widow and children of A. L. Smith, deceased, heard, tried and determined in the Courts of the United States, rather than in the Courts of the State of Oklahoma, of which the deceased, the then administratrix of the estate, and the widow and children and next of kin of A. L. Smith,

deceased, were actual and bona fide residents and citizens, and for the purpose of avoiding, nullifying and rendering ineffectual the orders and adjudications of the said United States District Courts, which had already been made, and the further order which was then anticipated of finding and holding that the said United States Courts had jurisdiction of the above mentioned cause of action. That petitioners further aver and allege that the said William H. Mecom is, and was in no way related to, or even acquainted with A. L. Smith in his life time, or with any member of the family of A. L. Smith, and that p-ior to the time of his appointment, as administrator, he had never even seen A. L. Smith, or the widow or children of A. L. Smith, that he does not now have any interest, as a next of kin, heir-at-law, or relationship to any of the next of kin or heirs-at-law, or as a creditor of the estate of A. L. Smith, deceased, that he filed his petition, or letters of administration, as above set out at the request of Roy F. Ford, who had, as attorney for Mrs. A. L. Smith, [fol. 19] or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, previously filed three (3) separate actions against these petitioners, and for the sole and only purpose of avoiding the rightful and proper jurisdiction of the United States Courts of the cause of action which had been previously procured. Petitioners further aver and allege that all cause, or causes of action, and all right, or rights of action for and on account of the injuries to, or death of A. L. Smith, deceased, had prior to December 10, 1928 fully accrued to and rested in Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, an actual resident and citizen of Pawnee County, State of Oklahoma, for the benefit of the widow and children of A. L. Smith, deceased, residents and citizens of said Pawnee County, State of Oklahoma, and that having three (3) times procured actions on said cause of action, as hereinabove set out, the said resignation of Mrs. A. L. Smith, or Lillian Smith, as such administratrix, with the request for the appointment of William H. Mecom, a resident of Columbia, Louisiana, and the securing of the appointment of said William H. Mecom and the issuing of letters of administration to him, as such administrator, was in effect and constituted an assignment and transfer of said cause, or causes of action, and said right, or rights of action from

the said Mrs. A. L. Smith, or Lillian Smith, administratrix, a resident and citizen of the State of Oklahoma, to the said William H. Mecom, administrator, a citizen and resident of the State of Louisiana, for the wrongful and fraudulent purpose of attempting to evade and avoid the jurisdiction of the Courts of the United States, to hear, try and determine the controversy between the personal representative of A. L. Smith, deceased, and these defendants, growing out of the injuries to and death of A. L. Smith, deceased.

Petitioners further aver and allege that in pursuance of the wrongful and fraudulent plan and design, as hereinabove set out, the said William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, as plaintiff, on January 5, 1929, commenced a fourth action in the District Court of Oklahoma County, State of Oklahoma, being case Number 57,527, against these petitioners, Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, by filing his petition with all of the material [fol. 20] allegations therein, the same as the allegations in the petitions previously filed in the name of Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, and praying for the recovery from these petitioners of the sum of One Hundred Thousand ($100,000:00) Dollars for the sole use and benefit of the widow and children of A. L. Smith, deceased, all of which more fully appears from the petition so filed, and which is now a part of the record of this Court, and which also appears from the certified transcript of the records on file in the District Court of the United States for the Western District of the State of Oklahoma, in case Number 3942-law in said Court, to both of which reference is hereby made. On February 4, 1929 notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, for the removal of said cause to the District Court of the United States for the Western District of Oklahoma, were filed and on the same day the District Court of Oklahoma County, upon consideration thereof, made and entered its order for the removal of said cause, as prayed. On February 28, 1929 a certified transcript of the record in said cause was duly filed in the District Court of the United States for the Western District of Oklahoma and docketed therein as case Number 3942-law. On March 4, 1929, the plaintiff, William H. Mecom,

administrator, filed his motion to remand said cause to the District Court of Oklahoma County. On May 7, 1929 upon hearing and consideration of said motion, said District Court of the United States determined and adjudicated that said court had full and complete jurisdiction of said action, and made and entered its order overruling plaintiff's motion to remand, and requiring plaintiff to make a cost deposit or file a cost bond in said action, and the plaintiff in open court refusing to comply with the order of said United States District Court, the said Court made and entered its order dismissing said action.

Petitioners further aver and allege that on January 26, 1929 William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, as plaintiff commenced this action in the District Court of Oklahoma County, Oklahoma against these petitioners, Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, as defendants, with all of the material allegations of the petition the same as the material allegations of the petitions in the four (4) suits previously filed, and hereinabove [fol. 21] described and supplementing said allegations with the further allegation that Archie Lee Smith from the time he was injured to the time of his death endured conscious pain and suffering, sustaining damage in the sum of Three Thousand ($3,000.00) Dollars, and praying judgment against these petitioners for the sum of Three Thousand ($3,000.00) Dollars for the benefit of the estate of Archie Lee Smith, deceased, all of which more fully appears in the petition on file in this action, to which reference is hereby made. On April 19, 1929 the defendant, Atlantic Oil Producing Company filed its answer, and on April 30, 1929, the defendant, Fitzsimmons Drilling Company, incorporated, filed its answer. On May 15, 1929, this case coming regularly on for trial, and a jury having been called into the jury box, the plaintiff, over the objection of defendants, these petitioners, each of whom at the time reserved their right and privilege of filing petitions to remove this action to the District Court of the United States for the Western District of Oklahoma, was given leave to file amended petition, and said amended petition was filed, and therein the plaintiff alleged two (2) causes of action against these petitioners, the first cause of action containing all of the material allegations found in the petitions in the four (4)

suits previously filed against these petitioners, as hereinabove described, and alleging that by reason of the wrongful death of Archie Lee Smith, his widow and children being his next of kin, were damaged in the sum of One Hundred Thousand ($100,000.00) Dollars, and praying a recovery against these petitioners for the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of the said widow and children, and in said second cause of action, by reference and adoption made the same allegations as in said other suits, supplementing the same by allegations of the conscious pain and suffering of the deceased between the time of his injuries and his death, by reason of which he was damaged in the sum of Three Thousand ($3,000.00) Dollars, and praying recovery from these petitioners for the sum of Three Thousand ($3,000.00) Dollars for the use and benefit of the estate of Archie Lee Smith, and in said amended petition, the plaintiff included a general prayer for judgment on both causes of action in the sum of One Hundred and Three Thousand ($103,000.00) Dollars, all of which more fully appears from said amended petition now on file in this action, to which reference is hereby made.

[fol. 22] Petitioners further aver and allege that the matters and things hereinabove set out constitute a wrongful and fraudulent scheme, plan and device concieved, [conceived] instigated and prosecuted by the said Mrs. A. L. Smith or Lillian Smith, and William H. Mecom and Roy F. Ford, who has appeared for both of them as their attorney for the purpose of avoiding the rightful and proper jurisdiction of the Courts of the United States over this controversy, concerning which jurisdiction the orders made by the said United States Courts, as hereinabove set out, constitute final and conclusive adjudications, and for the purpose of avoiding and thwarting the orders and adjudications of said United States Courts, and for the further purpose of attempting to render said orders inoperative and ineffectual, and for the further purpose of denying to these petitioners their rights and privileges of invoking jurisdiction of said United States Court.

IV

Your petitioners herewith present a good and sufficient bond, as provided by the statutes in such case made and provided, that it will enter in such United States District

Court for the Western District of Oklahoma, within thirty (30) days from the filing of this petition, a certified copy of the record in this case, and that they will pay all costs which may be awarded against them by said Court, if the United States District Court for the Western District of Oklahoma shall hold that this cause was wrongfully or improperly removed thereto.

The premises considered, your petitioners therefore pray that this court proceed no further herein, except to make its order of removal as required by law, and to accept the bond presented herewith, and direct transcript of the record herein to be made for said Court, as provided by law, and as in duty bound, your petitioners will ever pray.

Fitzsimmons Drilling Company, Inc. H. C. Thurman, Ray S. Fellows, Its Attorneys. Atlantic Oil Producing Company, by Hagan & Gavin, George F. Short, Its Attorneys.

[fol. 23] *Duly sworn to by H. C. Thurman and George F. Short. Jurats omitted in printing.*

[fol. 24] [File endorsement omitted.]

NOTE RE BOND FOR REMOVAL

(Bond for removal, with defendants as principals and American Employers' Insurance company as surety, in the sum of $500, approved by Sam Hooker, District Judge, was filed in the District Court of Oklahoma County, Oklahoma, June 4, 1929.)

IN DISTRICT COURT OF OKLAHOMA COUNTY

ORDER OF REMOVAL—Filed June 12, 1929

This cause coming on for hearing on the petition and bond of the defendants, Fitzsimmons Drilling Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, for an order removing and transferring this cause to the District Court of the United States for the Western District of Oklahoma, and it ap-

pearing to the Court that the petitioners have filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said petitioners defendants, as aforesaid, have given the plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for the removal to the United States District Court.

Now, Therefore, said petition and bond are hereby approved, and it is hereby ordered and adjudged that this cause be, and it is hereby removed and transferred to the District Court of the United States for the Western District of the State of Oklahoma, and the Court Clerk is hereby directed to make up and certify the record in said cause forthwith for transmission to said Court.

Done in open court, this 12 day of June, 1929.

Sam Hooker, District Judge.

[fol. 25] [File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed July 20, 1929

Comes now the plaintiff above named, and appearing specially for the purpose of this motion and for no other purpose, and moves the Court to remand the above entitled action to the State Court, from whence it was removed to this Court, on the ground and for the reason that the plaintiff at the time of the institution of the above entitled action in the State Court, and at the time of the filing of the Amended Petition in said cause, to-wit, on May 15, 1929, he was a bona fide resident and citizen of the State of Louisiana, and that the defendant, Fitzsimmons Drilling Company, at the time of the institution of said action, and at all times since, was a bona fide resident and citizen of the State of Louisiana, and that under the holding of the Supreme Court of the United States in the case of Memphis Street Railway Co. v. S. C. Moore, Admr. 243 U. S. 299; 37 Sup. Ct. Rep. 273, and various decisions of other in-

ferior courts, this Court has no jurisdiction of the parties to this action, nor of the subject matter.

[fol. 26] Plaintiff further in support of this motion states that he was legally appointed administrator of the estate of Archie Lee Smith, deceased, by the County Court of Pawnee county, State of Oklahoma, at the time the above entitled action was instituted, and at all times since has been acting as such administrator, and that said appointment was made in pursuance of the provisions of the Probate Code of the State of Oklahoma. That he was requested so to act by Mrs. A. L. Smith, widow of the deceased, and that the widow in requesting the appointment of this plaintiff as administrator of her deceased husband's estate acted within her legal rights granted by the Probate Code as aforesaid, and that no fraud was practiced upon the defendants herein by said appointment, either by the plaintiff or the widow of said deceased, as they merely pursued the legal rights given them by the Probate Statutes of the State of Oklahoma.

That under the authority of the City of Detroit, Mich. v. Blanchfield, 13F. (2d) 13, and other inferior courts, this Court has no authority or jurisdiction to inquire into the motive for the appointment of said administrator, as the County Court of the State of Oklahoma was vested with exclusive jurisdiction to make the appointment, and that the Federal Court has no probate jurisdiction whatever, nor any authority or jurisdiction to investigate or inquire into the motive or reason for the appointment of an administrator by a probate court of the State of Oklahoma.

Plaintiff herein specifically denies all the allegations contained in defendants' petition for removal, which are inconsistent with or contradictory to the allegations contained in this motion to remand and the allegations contained in plaintiff's amended petition on file in this action.

Plaintiff further states that the defendants have heretofore waived their right to remove this case to the Federal Court, on the ground and for the following reasons, to-wit: That at the time the amended petition was filed in this cause in the State Court, the defendants instead of immediately asking leave for time to file a petition and bond for removal in said cause, recognized the jurisdiction of the State Court and requested the State Court to continue the case and to grant them twenty days in which to plead to

the amended petition, and that such acts and conduct on the part of the said defendants constituted a waiver of [fol. 27] their rights to remove this case from the State Court to the Federal Court.

Wherefore, plaintiff prays that said cause be remanded to the State Court, from whence it was removed.

A. M. Meyer & Ford & Montgomery, Attorneys for Plaintiff.

Duly sworn to by Roy F. Ford. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RESPONSE TO MOTION TO REMAND—Filed Sept. 6, 1929

Come now the defendants and for response to plaintiff's motion to remand, deny all of the allegations therein contained, which are contrary to and in conflict with the allegations of these defendants in their petition for removal.

These defendants specifically state that William H. Mecom, at the time it is alleged he was appointed administrator of the estate of Archie Lee Smith, was, and still is, a stranger to Mrs. A. L. Smith, widow of Archie Lee Smith, deceased, and that the said Mrs. A. L. Smith had not, at that time nor at any time since, had any communication, [fol. 28] written or oral, with the said William H. Mecom, and that the said William H. Mecom was never requested by the said Mrs. A. L. Smith, to act as administrator of the estate of Archie Lee Smith, deceased, but consented to act as such administrator solely as an accom-odation [accommodation] and favor to the attorneys Ford and Montgomery, who were then engaged in the prosecuting of a damage suit against these defendants on account of injuries to and death of Archie Lee Smith.

These defendants further specifically allege and state that on May 15, 1929, when the plaintiff asked leave to file the amended petition herein, H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, made an objection to the filing of said amended petition, at the time

specifically reserving to Fitzsimmons Drilling Company the right to object to the jurisdiction of the court as to the additional cause of action in said amended petition, and the right to exercise the privilege of removal, and, thereupon, George F. Short, one of the attorneys for the Atlantic Oil Producing Company, adopted said objection as the objection of Atlantic Oil Producing Company. That, thereupon, the court permitted the filing of the amended petition, and, on its own motion, made an order continuing the case.

These defendants further state, that in the informal discussion following said order, and pursuant to the reservation made by the defendants of their right to exercise the privilege of removal, the court inquired how long the defendants wanted to plead, and the said H. C. Thurman merely stated that where an entirely new cause of action was brought in by amendment, the defendants ought to be given the statutory time of twenty days, intending thereby to merely inform the court of the contention of counsel, that upon the filing of an amended petition complete in itself, and stating a new cause of action, the statutes of the State of Oklahoma gave to the defendants twenty days in which to file their petition for removal, the same as the time allowed by statute for the return day of summons, and these defendants allege and state that neither of them, by any representative or attorney, asked for a continuance of said case or asked for time to plead, but at all times expressly reserved the right to exercise the privilege of removal, all of which more fully appears from a transcript of the proceedings of the District Court of Oklahoma County, State of Oklahoma, verified by the affidavit of Henry B. Walker, [fol. 29] official court reporter, which is attached hereto as exhibit "A."

Fitzsimmons Drilling Company, Inc., by H. C. Thurman, Ray S. Fellows; Its Attorneys. Atlantic Oil Producing Company, by George F. Short, Hagan & Gavin, Its Attorneys.

STATE OF OKLAHOMA,
Oklahoma County, ss:

George F. Short, being first duly sworn on oath says: That he is one of the attorneys for Atlantic Oil Producing Company, one of the defendants in the cause of William H. Mecom, Administrator, plaintiff, vs. Fitzsimmons Drilling

Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma and which on removal was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy F. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court, in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

[fol. 30] George F. Short.

Subscribed and sworn to before me this 6th day of September, 1929. Earl J. Newlin, Deputy Clerk, U. S. District Court, Western District of Oklahoma. (Seal.)

STATE OF OKLAHOMA,
Oklahoma County, ss:

T. Austin Gavin, being first duly sworn on oath says: That he is one of the attorneys for Atlantic Oil Producing Company, one of the defendants in the cause of William H. Macom, Administrator, plaintiff, vs. Fitzsimmons Drilling Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma, and which, on removal, was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy E. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court, in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

T. Austin Gavin.

Subscribed and sworn to before me this 6th day of September, 1929. Earl J. Newlin, Deputy Clerk, U. S. District Court, Western District of Oklahoma. (Seal.)

[fol. 31] State of Oklahoma,
Oklahoma County, ss:

H. C. Thurman, being first duly sworn on oath says: That he is one of the attorneys for Fitzsimmons Drilling Company, Inc., one of the defendants in the cause of William H. Mecom, Administrator, plaintiff, vs. Fitzsimmons Drilling Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma, and which, on removal was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable

Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy F. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

H. C. Thurman.

Subscribed and sworn to before me this 6th day of September, 1929. Allie Peters, Notary Public. My commission expires June 29, 1933. (Seal.)

[fol. 32] TRANSCRIPT OF PROCEEDINGS BEFORE HON. WYLEY JONES, JUDGE, MAY 15, 1929

The Court: Now, gentlemen, what sort of record do you want to make in this matter?

Mr. Ford: Well, I was just asking to file an amended petition in the case.

The Court: Is there any objection to it?

Mr. Thurman: The defendant, The Fitzsimmons Drilling Company objects to it for the reason that this case has been called for trial and the jury is in the box and the amended petition states a new, separate and distinct cause of action from that contained in the original petition; further, that the amended petition purports to state a cause of action of which this court is without jurisdiction and that the amended petition or the amendment presented seeks to prevent the defendants from exercising their right

in presenting a petition for removal, the original action not being subject to removal and the defendant makes this objection reserving to itself the right to object to the jurisdiction of the court as to this additional cause of action and the right to exercise the privilege of removal.

Mr. Short: The Atlantic Oil Producing Company, defendant in this cause joins in the objection of the Fitzsimmons Drilling Company and adopts the same as its own.

The Court: Of course, I understand the rule is in this jurisdiction, a man may amend his pleadings any time. I know of no reason why and I think plaintiff is entitled to file his amended petition if he desires to do so and I think the defendants are entitled to a continuance, and the amended petition will be filed and the defendants, of course are granted a continuance of the lawsuit if they wish it.

Mr. Thurman: Your Honor will let the record show each of the defendants except.

The Court: Each of the defendants excepts and exceptions are allowed. Now, I understand from counsel you are not ready for trial.

Mr. Thurman: No, we are not.

The Court: How long do you want to plead to this amended petition?

[fol. 33] Mr. Thurman: I think if an entirely new cause of action is brought in here we ought to be given the statutory time of twenty days.

Mr. Ford: There is no objection to that.

The Court: Twenty days, then, in which to plead to the amended petition.

STATE OF OKLAHOMA,
Oklahoma County, ss:

I, Henry B. Walker, of lawful age, being first duly sworn on oath say, that I am now and was on May 15, 1929 one of the official reporters in the District Court of the Thirteenth Judicial District in Oklahoma County, State of Oklahoma; that on the above date, I was called into the court room of Honorable Wiley Jones, District Judge, and directed to take in shorthand the statement of H. C. Thurman and others and the ruling of the court in a proceeding being had in case #57,713, William H. Mecom, Administrator, vs. Fitzsimmons Drilling Company, et al., and the

above and foregoing is a full, true and correct transcript of my stenographic notes showing all that was said and done in connection with said matter, on the date aforesaid.

Further affiant sayeth not.

Henry B. Walker.

Subscribed and sworn to *me* before me this 29th day of August, 1929. Allie Peters, Notary Public. My commission expires June 29, 1933. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO REMAND—Filed Sept. 6, 1929

Now on this 6th day of September, 1929, the above styled cause coming regularly on for hearing on the motion of the plaintiff to remand, and the court having heard the evidence offered, consisting of the proceedings in the matter of the estate of Archie Lee Smith, deceased, in the County Court of Pawnee County, State of Oklahoma, and the deposition of William H. Mecom and the affidavits attached to the response to the motion to remand and the verified tran- [fol. 34] script of the proceedings before Honorable Wyley Jones, Judge of the District Court in and for Oklahoma County, State of Oklahoma, and the agreement of the parties that the petition for removal contained a true and correct statement of the proceedings in the several prior actions to recover damages for the death of Archie Lee Smith, deceased, and the court having heard the arguments of counsel and being sufficiently advised finds that the allegations of the petition for removal are sustained and plaintiff's motion to remand should be overruled, to which the plaintiff excepts.

It is therefore Considered, Ordered and Adjudged that the plaintiff's motion to remand this case to the District Court in and for Oklahoma County, State of Oklahoma be and the same is hereby overruled, to which the plaintiff excepts.

On the same day there comes on for hearing the motion of the defendants to strike and the court having heard the argument of counsel and being sufficiently advised:

It is Considered, Ordered and Adjudged that the motion to strike be overruled, to which the defendants and each of them except, and it is further ordered that the defendants be allowed twenty days in which to file their answers herein.

Edgar S. Vaught, District Judge

O. K. Ford & Montgomery & A. H. Meyer, Attorneys for Plaintiff.

O. K. H. C. Thurman, Attorney for Defendant Fitzsimmons Drilling Co.

O. K. George F. Short, Attorney for Defendant Atlantic Oil Producing Co.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT FITZSIMMONS DRILLING COMPANY TO PLAINTIFF'S AMENDED PETITION—Filed Dec. 26, 1929

Comes now the defendant, Fitzsimmons Drilling Company, by leave of court first had and obtained, files this, its [fol. 35] answer to the first cause of action to plaintiff's amended petition and for its answer alleges and states:

I

This defendant denies all of the allegations in plaintiff's amended petition contained except such as are hereinafter specifically admitted.

II

This defendant admits that it is a corporation.

III

This defendant admits that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition was, as driller, in charge of, and working upon an oil well and was a man of large and extensive experience in his particular line of work, that said well had from time to time

prior to the accident complained of, been producing oil and gas and that said Archie Lee Smith had the full right and authority to shut down and discontinue the operation at said well whenever oil and gas was flowing, or about to flow from said well, and the full right and authority to exercise his own independent judgment as to the time of firing the boiler, or resuming operations at said well after oil and gas ceased to flow therefrom, that the said Archie Lee Smith had full and complete information and knowledge of all of the conditions at, in, and about said well, and all of the dangers connected with, or surrounding the work being done by Archie Lee Smith, were open, obvious and known to said Archie Lee Smith, and that by accepting said employment and continuing therein, and in doing the work which he was doing prior to, and at the time of said accident, the said Archie Lee Smith assumed all the risks of causing an explosion, and being injured as he was injured, and on account thereof this defendant is not liable to the plaintiff herein.

IV

For further defense this defendant alleges and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's petition was working on or about an oil well described in the petition when the explosion and fire occurred, that just prior to and at the time of said explosion and fire, that said Archie Lee Smith was guilty of negli-
[fol. 36] gence and carelessness, which either caused or contributed to the said explosion and fire, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under all of the surrounding circumstances and on account thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered this defendant prays that the plaintiff take nothing as against this defendant by reason of this action.

Fitzsimmons Drilling Company, by H. C. Thurman,
Its Attorney.

And comes now the defendant, Fitzsimmons Drilling Company, by leave of court first had and obtained, files this its answer to plaintiff's second cause of action to plaintiff's amended petition, and for its answer alleges and states:

I

This defendant denies all of the allegations in plaintiff's amended petition contained except such as are hereinafter specifically admitted.

II

This defendant admits that it is a corporation.

III

This defendant admits and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition, was, as driller, in charge of, and working upon an oil well and was a man of large and extensive experience in his particular line of work, that said well had from time to time, prior to the accident complaintiff, [complained of] been producing oil and gas and that said Archie Lee Smith had the full right and authority to shut down and discontinue the operation at said well whenever oil and gas was flowing, or about to flow from said well, and the full right and authority to exercise his own independent judgment as to the time of firing the boiler, or resuming operations at said well after oil and gas had ceased to flow therefrom, that the said Archie Lee Smith had full and complete information and knowledge of all of the conditions at, in, and about said well, and all of the dangers connected with, or surrounding the work being done by Archie Lee Smith were open, obvious and known to said Archie Lee [fol. 37] Smith, and that by accepting said employment and continuing therein, and in doing the work which he was doing prior to, and at the time of said accident, the said Archie Lee Smith assumed all the risks of causing an explosion, and being injured as he was injured, and on account thereof this defendant is not liable to the plaintiff herein.

IV

For further defense this defendant alleges and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition was working on or about an oil well described in the amended petition when the explosion and fire occurred, that just prior to and at the time of said explosion and fire, that said Archie Lee Smith

was guilty of negligence and carelessness, which either caused or contributed to the said explosion and fire, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under all of the surrounding circumstances and on account thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered this defendant prays that the plaintiff take nothing as against this defendant by reason of this action.

Fitzsimmons Drilling Company, by H. C. Thurman, Its Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT ATLANTIC OIL PRODUCING COMPANY TO PLAINTIFF'S AMENDED PETITION—Filed Oct. 5, 1929

Comes now the defendant, Atlantic Oil Producing Company, by leave of court first had and obtained, files this its answer to the first cause of action to plaintiff's amended petition and for such answer alleges and states:

1. This defendant denies all of the allegations in plaintiff's petition contained upon which said plaintiff seeks to recover damages from this defendant.

2. The defendant admits that it is a Corporation as alleged in plaintiff's amended petition, but specially denies [fol. 38] that it had any contractual relation with the deceased, Archie Lee Smith, or that the said Archie Lee Smith was at the time of his death engaged by this defendant as an employe or otherwise, and that so far as this defendant is concerned, the said Archie Lee Smith occupied the relation of an independent contractor and was an independent contractor in the drilling of the well named in plaintiff's petition and had no contract of employment by this defendant and was not the agent or employe of this defendant in any manner whatsoever; that this defendant did not have or exercise the right to employ said Archie Lee Smith

or to discharge him or any of the other employees working under the direction of the said Archie Lee Smith in the drilling of the well as described in plaintiff's petition.

3. That if the said defendant, Atlantic Oil Producing Company, did in any manner by operation of law or otherwise become the joint employer or become charged with the direction of the operations of the said Archie Lee Smith, or those working under him, (which this defendant specially denies) then and in that event the said Archie Lee Smith was fully aware of all of the risks and hazards of the drilling of said well; that he was an experienced and skilled oil well driller, and as such, assumed all of the risks and hazards of said enterprise, for which this defendant was and is in no way responsible.

4. That if this defendant by operation of law or otherwise in any manner became responsible for the direction of the work on which the deceased, Archie Lee Smith, was engaged, (which this defendant specially denies) then and in that event the accident and injury to the said Archie Lee Smith, resulting in his death, as alleged in the petition, was due to the negligence of him, the said Archie Lee Smith, or contributed to by such negligence of said deceased, for which this defendant was and is in no way responsible.

Wherefore, having fully answered as to plaintiff's count No. 1; this defendant prays that said plaintiff take nothing by reason of this action.

Atlantic Oil Producing Company, by George F. Short, C. W. King, Its Attorneys.

[fol. 39] Answer to Cause of Action No. 2

Comes now the defendant, Atlantic Oil Producing Company, by leave of Court first had and obtained, files this its answer to plaintiff's second cause of action to plaintiff's amended petition, and for such answer alleges and states:

1. That this defendant denies all of the allegations in plaintiff's amended petition contained upon which said plaintiff seeks to recover damages against this defendant.

2. This defendant admits that it is a Corporation, but denies that it was ever at any time the employer on its own account or jointly with any other corporation or per-

son, of said Archie Lee Smith, deceased; and that if the said Archie Lee Smith sustained injuries, and as a result of the injuries, died, as a result of the accident set up in said petition, then in that event the said Archie Lee Smith, deceased, was acting in the capacity of an independent contractor with parties other than this defendant and that defendant did not have or exercise any control whatsoever over the said Archie Lee Smith, or any of the other employees working under him in the matter of the drilling of the oil well as described in plaintiff's petition; that in such enterprise the said Archie Lee Smith, deceased, occupied the relation of an independent contractor and this defendant had and exercised no control whatsoever over the said Archie Lee Smith and had no power to employ or discharge the said Archie Lee Smith, and did not at any time assume to direct the actions or work of the said Archie Lee Smith or any one working under him as alleged in plaintiff's petition and the said defendant denies any responsibility whatsoever for the accident and resulting injuries of said Archie Lee Smith, deceased.

3. That if the said defendant did in any wise by operation of law or otherwise become charged with the direction of said work as alleged in plaintiff's petition, then and in that event, the said Archie Lee Smith, deceased, being an experienced and skilled oil well driller of many years' standing was fully aware of and assumed all of the danger and hazards of said undertaking and assumed the risks involved therein and this defendant denies liability for the accident and resulting injuries and death, on account of said assumption of risk by the said Archie Lee Smith.

4. That if by operation of law or otherwise, this defend-
[fol. 40] ant became charged with responsibility for the direction of said work and became the joint employer of the said Archie Lee Smith, deceased, and those working under him, then said defendant alleges, that if the said Archie Lee Smith, was injured and died as a result of the accident as described in the petition, that such accident was caused or was contributed by the negligence of the said Archie Lee Smith, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under the surrounding circumstances and on ac-

count thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered, this defendant prays that the said plaintiff take nothing against this defendant by reason of this action.

Atlantic Oil Producing Company, Defendant, by George F. Short, C. W. King, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REPLY TO SEPARATE ANSWERS OF DEFENDANTS—Filed Oct. 15, 1929

Comes now the plaintiff, and files this as his reply to the separate answers of the defendants on file herein, and for cause thereof, avers:

That he denies, each, every, all and singular the allegations contained in said separate answers, and each and every paragraph thereof which are inconsistent with or contradictory to the allegations contained in his amended petition on file in this action.

Ford & Montgomery, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT—Filed Dec. 18, 1929

Now on this 18th day of December, 1929, the same being a regular judicial day of the Special March 1929 Term of [fol. 41] this court, the above styled cause coming regularly on for trial, and the plaintiff appearing by his attorneys, Ford & Montgomery, and the defendant Fitzsimmons Drilling Company, appearing by its attorneys, H. C. Thurman, Ray S. Fellows and A. F. Moss, and Atlantic Oil Producing Company, appearing by its attorneys Short & King and

Hagen and Gavin, and all parties having announced ready for trial, and a jury having been empannelled [impaneled] and sworn, the plaintiff introduced in evidence a stipulation of the parties as to the residence of the plaintiff and the defendant, Fitzsimmons Drilling Company, Incorporated, and renewed his motion to remand to the State Court, whereupon, the presiding judge refused to renew the order overruling plaintiff's motion to remand, duly entered after a hearing before the resident judge of this district, denying plaintiff's renewed motion, to which the plaintiff excepted. Thereupon the plaintiff introduced evidence and rested, and the defendants separately demurred to the plaintiff's evidence, and the court having heard the arguments of counsel and being sufficiently advised,

It is Considered, Ordered and Adjudged that the separate demurrer of the defendants to the plaintiff's evidence, be and the same are hereby sustained, to which the plaintiff excepted and is allowed his exception.

It is further Considered, Ordered and Adjudged that this action be dismissed and the defendants have judgment against the plaintiff for costs.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING ADDITIONAL TIME TO FILE BILL OF EXCEPTIONS—Filed Feb. 12, 1930

Be It Remembered, That now on this 12 day of February, A. D. 1930, the above entitled action coming on to be heard upon plaintiff's application for additional time herein to make, serve and file a Bill of Exceptions in the above entitled cause, and the Court being fully advised in the premises finds that the 60-day time heretofore allowed plaintiff in said cause on December 18, 1929, by the Hon. T. Blake Kennedy, sitting as Trial Judge in said cause, is insufficient time in which to file said Bill of Exceptions, and [fol. 42] that said application should be and the same hereby is sustained.

It is, Therefore, by the Court Ordered, That the plaintiff be, and he hereby is granted and given up to and including

March 15th, A. D. 1930, to make, serve and file a Bill of Exceptions in the above entitled action.

Edgar S. Vaught, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Feb. 18, 1930

Comes now the plaintiff, and presents the annexed statement, duly signed by the Trial Judge, Hon. T. Blake Kennedy, as his Bill of Exceptions in the above entitled cause.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff.

RECORD OF EVIDENCE AND PROCEEDINGS ON HEARING OF PLAINTIFF'S MOTION TO REMAND THE ABOVE-ENTITLED ACTION TO THE STATE COURT

The allegations of the defendants' petition for removal were all placed in issue by a verified motion to remand, which denied the allegations of the petition for removal, and the affirmative allegations of the motion to remand were placed in issue by verified response thereto, denying such allegations and attaching a transcript of the proceedings in the State Court at the time of the filing of plaintiff's amended petition in such court prior to the filing of the petition for removal.

However, on the hearing of the motion to remand, it was agreed that at the time of the filing of the amended petition in the above cause, which was in the State Court and which action was removed, Mrs. A. L. Smith and her two children, Dona G. Smith and Welford Lee Smith, who are referred to in said amended petition, were residents and citizens in the State of Oklahoma, and resided in the city of Cleveland, Pawnee County, in said State, and such citizenship re-
[fol. 43] mained unchanged, and that A. L. Smith, the deceased, for whose death damages are sought in said action, was a resident of said city, county, and state at the time of his death and left an estate in said county consisting of real estate, a homestead, and kitchen and household furniture, and the two causes of action set out in said amended petition arose wholly within the State of Oklahoma.

It was further agreed between the parties in open court on the hearing of said motion that the petition for removal correctly stated the filing of the four prior actions and correctly stated the proceedings in each, except, that in case #56098, filed in the District Court of Oklahoma County and removed to the United States Court for the Western District of Oklahoma, as case #3819—Law, and in case #43033, District Court of Tulsa County, Oklahoma, removed to the United States Court for the Northern District of Oklahoma, as #730—Law, L. H. Sharp was added to the defendants named in the prior suits as a party defendant; that all of said four suits involved one cause of action for $100,000.00 damages for the benefit of the widow and children for the death of A. L. Smith, but the petition in either of the cases did not contain a cause of action for damages for pain and suffering of the deceased, which were underwent from the time he was injured until he died. The present suit was originally filed in the District Court of Oklahoma County, State of Oklahoma, being case #57716, in said court, seeking to recover damages in the sum of $3,000.00 for the pain and suffering which the deceased, A. L. Smith, underwent from the time he was injured until he died, a period of some eight or ten hours. When the case was called for trial, the amended petition was filed in said cause, which contained two causes of action, the first cause of action being for the sum of $100,000.00 damages for the death of said deceased, A. L. Smith, and for the benefit of his next of kin, his widow and children, and the second cause of action being for $3,000.00 damages for the pain and suffering which the deceased underwent from the time he was injured until he died.

The defendants, on a motion to remand, introduced a copy of the probate proceedings of the County Court of Pawnee County, Oklahoma, in the matter of the estate of A. L. Smith, deceased, otherwise known as Archie Lee Smith, the [fol. 44] court having jurisdiction of the administration of said estate, which record showed in substance the following:

That the allegations with reference to the appointment of the widow, her resignation and the appointment of Wm. H. Mecom, as administrator of said estate, as charged in the petition for removal were true.

The record further showed that the estate had never been closed up but was still open and subject to administration.

The plaintiff, at the time this record was introduced, virtually admitted that one of the main purposes of having Wm. H. Mecom, a resident and citizen of the State of Louisiana, appointed as administrator of said estate, was to keep the defendants from removing the above entitled action from the State to the Federal Court, however, counsel for the plaintiff contended that the administrator had certain other duties to perform, which were the closing up of the estate of said deceased, A. L. Smith, and the bringing of this action, which included the cause of action for damages for pain and suffering, which under the Oklahoma law could only be prosecuted by the administrator. The defendants also took the deposition of the plaintiff, Wm. H. Mecom, and he was not cross examined by plaintiff's counsel. He testified, in substance, that he consented to act as administrator at the request of Roy F. Ford, of the law firm of Ford & Montgomery of Tulsa, Oklahoma, and that he received from them, in December, 1928, some papers to be signed by him consisting of an oath as administrator and a power of attorney naming, according to his judgment the widow of A. L. Smith, and the probate records introduced showed that on December 26, 1928, Wm. H. Mecom, signed the oath and signed an appointment of Mrs. A. L. Smith as resident agent for the foreign administrator, these two latter instruments being filed in the County Court of Pawnee County, Oklahoma on January 3, 1929. He further testified that he did not sign the petition for his appointment as administrator, and that according to his best judgment he did not sign the bond of administrator, and it is admitted that the name of Wm. H. Mecom was signed to the petition and bond by Roy F. Ford, as his attorney, and it is further agreed that said bond was filed and approved on December 12, 1928, before the letters of administration [fol. 45] were signed on December 26, 1928. He further testified that from the date of receiving the letters and papers to be signed from Roy F. Ford, attorney, to May 31, 1929, he had nothing further to do with the estate of A. L. Smith, deceased, and received absolutely no information about such estate, that he did not, at any time, enter into any agreement with Ford & Montgomery or A. H.

Meyer, either personally or as administrator, to either procure his appointment as administrator or file any action in his name, and that he, at no time, gave any direction with reference to the commencement of any action; and that he did not advance or provide any cost deposit for the filing of any suit, and that he never, at any time, had any knowledge or information of any assets or claim or litigation in which the estate of A. L. Smith was interested; that he was not related to or acquainted with either A. L. Smith, deceased, or any of his next of kin or heirs; so far as he could learn A. L. Smith left no estate in the State of Louisiana and that no property at any time came into the hands of the said Mecom, as administrator, and that Mrs. A. L. Smith, as administrator, never accounted to him for any assets of the estate of A. L. Smith; that he was a young attorney living at Columbia, Louisiana, and resided there for a number of years. He stated that he did not have any contract for any fees or accepted any fees and that his appointment was made as an accommodation to the firm of attorneys above referred to. It was agreed by the parties that both the plaintiff and the defendant, Fitzsimmons Drilling Company, Inc., a corporation, were residents and citizens of the State of Louisiana, at the time the amended petition was filed in the above entitled action in the State Court, and had both been residents and citizens for a long period of time prior thereto.

The plaintiff introduced no evidence in support of his motion to remand, but plaintiff contended that on account of what his [is] hereinabove set out that the court had no jurisdiction of the parties to the record. Honorable Edgar S. Vaught denied plaintiff's motion to remand to the State Court and expressed himself as being of the opinion that the plaintiff and his counsel were attempting to toy with the court and impose upon the court. To the court's order, in denying and overruling motion to remand, the plaintiff excepted and the exceptions were by the court allowed.

[fol. 46] RECORD OF EVIDENCE AND PROCEEDINGS ON THE TRIAL OF THE ABOVE-ENTITLED ACTION

After the jury had been empanelled in the above entitled action to try said case, and at the beginning of the introduction of testimony, it was agreed between the parties in open court, that the plaintiff Wm. H. Mecom, administrator of

the estate of A. L. Smith, and the defendant Fitzsimmons Drilling Company, Inc., a corporation, at the time of the filing of the amended petition in the above entitled action in the State Court, the said plaintiff and the last-mentioned defendant were both bona fide residents and citizens and inhabitants of the State of Louisiana. The plaintiff, thereupon, introduced a certified copy of the letters of administration, which showed that on the 10th day of December, 1928, William H. Mecom was appointed administrator of the estate of A. L. Smith, deceased, by the honorable County Court of Pawnee County, State of Oklahoma; that the said Wm. H. Mecom took his oath as administrator on the 26th day of December, 1928, before a Notary Public in the State of Louisiana, and that said letters of administration were duly filed in the County Court of Pawnee County, Oklahoma, on January 3, 1929, prior to the institution of the above entitled action in the State Court. The plaintiff also introduced in evidence a written appointment of agent which written appointment stated in substance that the said Wm. H. Mecom, as administrator of the estate of A. L. Smith, deceased, did thereby appoint Mrs. A. L. Smith, or Mrs. Archie Lee Smith, as his agent in the State of Oklahoma, for the purpose of accepting service of process as provided by the statutes of the State of Oklahoma. This instrument was dated December 26, 1928, signed by Wm. H. Mecom filed in the County Court of Pawnee County, Oklahoma, on the 3rd day of January, 1929. At this stage of the trial, the plaintiff orally requested the Honorable T. Blake Kennedy, the presiding judge at said trial, to remand said cause to the State Court from whence it was removed to the Federal Court on the ground and for the reason that the court had no jurisdiction of the parties of the record. Whereupon, after argument of counsel, the presiding judge overruled and denied said motion to remand to the State Court, and as his reason therefor, stated that the matter had already been passed on by the Honorable Edgar S. Vaught, who heard the proceedings in the original motion to remand filed in said case and overruled and denied the same, to which action of the court in denying said [fol. 47] motion to remand, the plaintiff excepted and exceptions were allowed.

At the conclusion of plaintiff's evidence, the plaintiff again renewed his oral motion to remand, which was again

denied by the trial judge, the Honorable T. Blake Kennedy. Thereupon, the defendants separately demurred to the plaintiff's evidence, which demurrers were by the court sustained, all of which is disclosed by the written Journal Entry of Judgment filed in the above entitled action dated December 18, 1929.

At the time of the rendition of the above and foregoing judgment, on December 18, 1929, the plaintiff asked and was granted sixty days in which to make, prepare and serve bill of exceptions in the above entitled action, and by a later order, dated February 12th, 1930, the plaintiff was granted and given an additional extension of time to make, prepare and serve bill of exceptions in the above entitled action and was granted up to and including March 15, 1930, to make, prepare and serve bill of exceptions in the above entitled action.

STIPULATION APPROVING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing statement of facts and narrative of testimony contains a full, true, correct and complete copy of all of the evidence and proceedings had in the above entitled action, in so far as the same affects the question of the removability of said cause from the State Court to the Federal Court and the jurisdiction of the Federal Court to hear and try said cause, and we hereby agree that the trial judge, Honorable T. Blake Kennedy, may sign the same as a bill of exceptions in the above entitled action, with the exception of the written Journal Entry of Judgment dated December 18, 1929, which is already a part of the record in the above entitled action.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff. Ray S. Fellows, H. C. Thurman, Attorneys for Defendant Fitzsimmons Drilling Com-
[fol. 48] pany. George F. Short, C. W. King, Attorneys for Defendant Atlantic Oil Producing Company.

CERTIFICATE AND ORDER APPROVING STATEMENT OF EVIDENCE AND PROCEEDINGS

Be It Remembered, That now on this 18 day of February, A. D. 1930, the foregoing narrative statement of facts, evidence and proceedings in the above entitled cause having been duly presented to me, and having examined the stipulation of counsel annexed thereto, and having examined such narrative statement of the evidence and proceedings,

It is Hereby Ordered and Adjudged by the Court, That the said narrative statement is a fair and true statement of the facts and evidence submitted on the trial of said cause, and is a fair statement of the proceedings had and taken therein insofar as the question of the jurisdiction to try and determine said cause is concerned, and also the removability of said cause from the state to the federal court, and;

It Is Hereby Ordered, That the same be and hereby is settled and signed as a Bill of Exceptions in the above entitled action, and that the same constitutes the full Bill of Exceptions in said cause, with the exception of the written Journal Entry of Judgment, dated December 18, 1929, which has already been filed and made a part of the record in the above entitled action.

Witness My Hand as the Trial Judge who presided in the trial of the above entitled action in the United States District Court for the Western District of Oklahoma, on February 18, A. D. 1930.

T. Blake Kennedy, United States District Judge.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Feb. 19, 1930

The above named plaintiff, feeling himself agreed [aggrived] by the decree made and entered in this cause on the 18th day of December, A. D. 1929, does hereby appeal from [fol. 49] the said judgment and decree to the U. S. Circuit Court of Appeals for the Tenth Circuit, for the reason

specified in the Assignment of Errors, which is filed herewith, and plaintiff prays that his said appeal be allowed.

That a citation issue, as provided by law. That a transcript of the record proceedings and papers upon which the said decree is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit, and that a Supersedeas be awarded, as provided by law.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff, William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

[Filed endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 19, 1930

Comes now the plaintiff in the above entitled cause and shows to the Court that the judgment and decree entered therein on the 18th day of December, 1929, is erroneous and unjust to the plaintiff, and contains manifest error, which plaintiff assigns as follows:

(1) That the Court erred in overruling and denying, and in not granting and sustaining plaintiff's motion to remand, due to its lack of jurisdiction because both the plaintiff and the defendant were bona fide residents and citizens of the State of Louisiana at the time the above entitled action was instituted in the state court and removed to the U. S. District Court for the Western District of Oklahoma.

(2) That the Court erred in retaining jurisdiction, and in forcing plaintiff to try said cause in the above named court, because both the plaintiff and the defendant were bona fide residents and citizens of the state of Louisiana at the time said cause was originally filed, and at the time the same was removed, and at the time the same was tried.

(3) That the Court erred in rendering the judgment dated December 18, 1929, in the above entitled action in favor of the defendants and against the plaintiff, because the court had no jurisdiction to render the same on account

[fol. 50] of the plaintiff and the defendant both being residents and citizens of the state of Louisiana at the time the above entitled action was originally filed in the state court, and at the time the same was removed to the Federal Court, and at the time the said judgment was rendered in said cause.

Wherefore, plaintiff prays that said judgment be reversed and set aside, and that said cause be ordered remanded to the state court from whence it was removed.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff, William H. Mecom, Admr. of the Estate of Archie Lee Smith, Deceased.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Feb. 25, 1930

Be It Remembered, That now on this 25 day of Feby., 1930, the above entitled action coming on to be heard upon the plaintiff's petition for appeal filed herein, and the Court being fully advised in the premises finds that said appeal should be and the same hereby is granted, upon the plaintiff giving a bond in the sum of five hundred dollars ($500.00) to cover the costs in said case, and conditioned further that the said plaintiff will exercise due diligence in the prosecution of his said appeal.

Edgar S. Vaught, Judge of the U. S. District Court.

[File endorsement omitted.]

NOTE REBOND ON APPEAL

(Bond on appeal in the sum of $500, with appellant as principal and The Century Indemnity Company as surety, approved by the District Judge, was filed in District Court Feb. 25, 1930.)

In United States District Court

Præcipe for Record.—Filed Feb. 25, 1930

To the clerk of the United States District Court for the Western District of Oklahoma:

You are hereby requested and directed to prepare a transcript for appeal in the above case, said transcript to include the following:

[fol. 51] 1. Plaintiff's Amended Petition.

2. Plaintiff's Petition for Removal, Notice of Removal, Bond on Removal, Order on Removal, Certificate of Clerk of State Court on Removal.

3. Plaintiff's Motion to Remand to the State Court.

4. Response of Defendants to Plaintiff's Motion to Remand.

5. Order Overruling and Denying Motion to Remand.

6. Separate Answer of Defendant, Fitzsimmons Drilling Company, Inc.

7. Separate Answer of Defendant, Atlantic Oil Producing Company.

8. Reply of Plaintiff to Separate Answers of Defendants.

9. Bill of Exceptions.

10. Journal Entry of Judgment, of December 18, 1929.

11. All Orders Extending Time to File Bill of Exceptions.

12. Notice of Appeal.

13. Petition for Appeal.

14. Assignment of Errors.

15. Order Allowing Appeal.

16. Citation and Service.

17. Appeal Bond.

18. Præcipe for Record, and Election as to Printing the Record.

19. Certificate of Clerk, to be attached to the record by yourself.

You will cause said transcript of the record to be duly certified and lodged with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, at Denver, Colorado, for filing, as provided by law, and plaintiff hereby elects to have the said Record printed under the

direction, supervision and control of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 25th day of February, 1930.

Ford & Montgomery, Attorneys for Plaintiff.

The undersigned, Attorneys of Record for the defendants in the above entitled action, hereby acknowledge service [fol. 52] of a copy of the foregoing Præcipe for Record, and agree and understand that the Clerk shall include the foregoing papers in the transcript making up the record in said cause.

Dated this 25th day of February, 1930.

H. C. Thurman, Attorneys for Defendant Fitzsimmons Drilling Company, Incorporated, a Corporation. George F. Short & C. W. King, Attorneys for Defendant Atlantic Oil Producing Company, a Corporation.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] Appearances of counsel omitted in printing.

[fol. 54] Minute entry of argument and submission October 16, 1930, omitted in printing.

In United States Circuit Court of Appeals, Tenth Circuit, January Term, 1931

No. 259

Messrs. Rey F. Ford, S. J. Montgomery, Theo. H. Haugh, and A. H. Meyer for Appellant.

Messrs. H. C. Thurman, Ray S. Fellows, for Appellee Fitzsimmons Drilling Company, Inc.; Messrs. George F.

Short, C. W. King, H. H. Hagen and T. A. Gavin for appellee Atlantic Oil Producing Company.

Before Lewis and Cotteral, Circuit Judges, and Pollock, District Judge

OPINION—Jan. 20, 1931

POLLOCK, District Judge, delivered the opinion of the court.

This action was instituted in a state court of Oklahoma to recover damages on account of the death of Archie Lee Smith, alleged to have been caused by the negligence and wrongful act of the defendants Fitzsimmons Drilling Company, a corporation of Louisiana, and The Atlantic Oil Producing Company, a corporation of Delaware. Smith was injured on May 24, 1927, and died on the following day. He left surviving him his widow, Lillian Smith and two small children. The statute of Oklahoma, sections 824 and 825, Compiled Laws of 1921, provide that damages in such case inure to the exclusive benefit of the widow and children, if any, to be distributed to them in the same manner as personal property of the deceased.

[fol. 55] The Supreme Court of that state, in St. Louis & S. F. R. Co. v. Goode, 42 Okl. 784, 142 Pac. 1185, held that the damages recovered in such a suit become assets of the decedent's estate but belong exclusively to the beneficiaries named therein. Shortly after the death of Smith his widow was appointed administratrix and she brought an action against the defendants in the state court alleging she and the two children as beneficiaries had been damaged in a very large amount. The defendants removed that case to the federal court and the plaintiff being unsuccessful on her motion to remand dismissed her action and shortly thereafter instituted another action like the first. This went through the same procedure as the first case. Thereafter, she resigned as administratrix and one William H. Mecom, a citizen and resident of the state of Louisiana was appointed administrator by a probate court of Oklahoma. He then brought a like action in the state court. It was removed to the federal court. That court refused to remand it. The plaintiff dismissed and then he brought this action

in the state court, in which, as in the prior cases, he embodied two counts. In the first count he alleged that he sues for the use and benefit of the widow and two minor children and asks damages in the sum of one hundred thousand dollars. In the second count he alleged deceased was conscious from the time he was injured until he died and on account of his injury suffered bodily pain and mental anguish from the time he was injured until he died, and prays damages in the sum of three thousand dollars therefor. The case was removed to the federal court and on the court's refusal to remand it went to trial and resulted in favor of defendants. Appellant comes here assigning error that the court overruled his motion to remand to the state court.

The grounds for the removal of the case from the state to the federal court were, first, diversity of citizenship, and second, a fraudulent intent and purpose on the part of Mrs. Smith and her attorney and the present plaintiff to defeat federal jurisdiction. Advertising to the last point, it appears that the resignation of Mrs. Smith and the appointment of Mecom in her stead was solely the act of her counsel who brought the prior suits and this one. He wrote to Mecom asking him if he would accept such an appointment. Mecom did not come to Oklahoma but signified his willingness to accept the appointment solely as an accommodation. [fol. 56] When he was appointed the attorney for plaintiffs signed the required oath and appointed Mrs. Smith as his resident agent. He did not sign the petition for his appointment as administrator nor the required bond. His name was signed to the petition and bond by counsel for the plaintiff in this case who had brought the prior suits for Mrs. Smith. He had nothing further to do with the estate of deceased and received no information about the estate. He gave no direction about the commencement of this or any other suit. He had no information about any litigation in which the estate might be interested and was in no way related to the deceased. So far as he could learn, the deceased left no estate in the state of Louisiana. He acted in the matter merely to accommodate Mrs. Smith's attorney. Counsel for appellant contends that under the laws of Oklahoma the appointment of Mecom as administrator was a legal act. That Mrs. Smith and her counsel acted lawfully in the procuring of Mecom's appointment and that their actions in that re-

spect cannot be held to have been fraudulent conduct, and that inasmuch as Mecom and one of the defendants were citizens and residents of the same state the case could not be removed on the ground of diversity of citizenship. I pass this point for the present.

There was diversity of citizenship between the beneficiaries, Mrs. Smith and her two children on the one side, and both defendants on the other; and it is contended by counsel for appellees that the citizenship of the beneficiaries and not of the nominal plaintiff controls. The whole recovery, should there be any, on the first count would go exclusively to the beneficiaries; no one else would have any interest therein. It would not belong to the estate of the deceased to be administered as other property of the estate, if any.

There can be no doubt but that if the recovery had on the first count was to go into the estate of deceased to be administered as part of that estate the administrator would be a proper and necessary party to the case for in such event he and his bond as administrator would be held liable for its proper application and distribution. But, in the instant case, while by force of the statute creating a cause of action for death by wrongful act when no such right of action existed at the common law, the action is purely statutory and an administrator may maintain the action for the sole use and benefit of the widow and children of the de- [fol. 57] ceased, and on no other grounds, and for no other purpose. It is the contention of defendants in such case the administrator is a purely nominal party and those for whose use and benefit the action is brought and prosecuted are the real parties in interest. That for the purpose of determining the jurisdiction of the federal courts of our country regard is had to the real parties in interest and not the merely nominal party. Thus, in Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445, Mr. Justice Brewer, delivering the opinion for the court, said:

"For purposes of jurisdiction in the Federal Courts regard is had to the real rather than to the nominal party. Brown v. Strode, 5 Cranch, 303; McNutt v. Bland, 2 How. 9; State of Maryland, for the use of Markley v. Baldwin, 112 U. S. 490. See, also, Gaither v. Farmers' & Mechanics Bank of Georgetown, 1 Pet., 37, 42, in which the issue submitted

to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form the cestui que use is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

In Maryland v. Baldwin, 112 U. S. 490, Mr. Justice Field, delivering the opinion for the court, said:

"So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

See, also, Huff v. Hutchinson, 14 How. 586; Ferguson v. Ross, 38 Fed. 161, and cases cited therein; Browne v. Strode, supra; McNutt v. Bland, supra; State of Indiana v. Glover, 155 U. S. 513.

[fol. 58] It is further to be noted the petition for removal in this case pleads a separable controversy between the real parties in interest, Mrs. Smith, and her two children. Also a collusive attempt on the part of Mrs. Smith and the foreign plaintiff administrator by collusion and fraud to defeat the jurisdiction of the federal courts. In such case the case of Cerri v. Akron-People's Telephone Company and the village of Cuyahoga Falls, 219 Fed. 285, by a parity of reasoning would appear to be much in point. While that case is not like the present one in point of fact, by parity of reasoning it is alike in principle with the instant case. In that case, as here, the action was brought to recover damages for death by wrongful act of one William McCracken, a citizen of the state of Ohio, as were defendants the Telephone Company and the village of Cuyahoga Falls. In that case, as here, the widow of the deceased had the preferential

right of appointment as the administratrix of the estate of her husband, and there, as here, the widow renounced her right of appointment, and the plaintiff, a citizen of the Kingdom of Italy was appointed administrator and brought the action to recover for the wrongful death in the federal court. In that case, the object and purpose of the appointment was to so frame an action as to escape the jurisdiction of the state court and give the federal court jurisdiction. The object and purpose in *this* case of the appointment of a foreign administrator was to escape from the jurisdiction of the state court and give the federal court jurisdiction. The object and purpose in this case of the appointment of a foreign administrator was to escape the jurisdiction of the federal court and give the state court sole jurisdiction. In that case the beneficiaries who would take the entire recovery had were citizens of Ohio with defendants. In this case the beneficiaries who would take the entire recovery, if any be had, are citizens and residents of Oklahoma, a state foreign to that of Louisiana and Delaware. The court in that case first raised and determined the question of jurisdiction, whether there was collusion between the beneficiaries and others for the appointment of a citizen of a foreign country as administrator for the purpose of escaping the jurisdiction of the state and making a case cognizable in the federal court. In the course of an exhaustive and well reasoned opinion, citing a wealth of authorities, it was held the federal court had no jurisdiction and the case was [fol. 59] dismissed. The very object and purpose of the grant by Congress of jurisdiction to the federal courts of our country was to permit citizens of foreign states litigating with citizens of another state to escape the local influence of their adversaries by removal of such controversy into the federal court.

I am convinced on both grounds, under the peculiar facts of this case, the removal of the cause of action for death by wrongful act into the federal court was both consonant with justice and the true rule which should govern in such controversy.

Coming now to the second cause of action removed and pleaded in the petition, it may be said. That cause of action could neither have been brought in the federal court nor, standing alone, have been removed thereto for want of

jurisdiction over the subject-matter in a federal court for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts of causes of action, one of which controversies is removable into a federal court, and the other not removable, a removal into a federal court of the cause of action which may be removed, brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. Geer v. Mathieson Alkali Works, 190 U. S. 428; Barney v. Latham, 103 U. S. 205; Brooks v. Clark, 119 U. S. 502; Connell v. Smiley, 156 U. S. 335; Venner v. Southern Pac. Co., 279 Fed. 832; Rogers v. Penobscot Mining Co., 154 Fed. 606; Cella, Adler & Tilles v. Brown, 136 Fed. 439; Hamilton v. Empire Gas & Fuel Co., et al., and Schriver v. Same, 297 Fed. 422; Hoffman v. Lynch, 23 Fed. (2d) 518; Bedell v. Baltimore & O. R. Co., 245 Fed. 788; Strother v. Union Pac. R. Co., 220 Fed. 731; Flas v. Illinois Central R. Co., 229 Fed. 319, and many other cases.

It follows, on the entire record, we find no reversible error and the judgment is therefore affirmed.

It is so ordered.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

COTTERAL, Circuit Judge, dissenting:

There was not diversity of citizenship in this case be-
[fol. 60] tween the plaintiff and the defendant, Fitzsimmons Drilling Company, both of them being citizens of Louisiana. To avoid the difficulty, it was claimed in the petition for removal that the plaintiff's selection and appointment as administrator was fraudulently obta-ned, in order to defeat the jurisdiction of the Federal Court. In the majority opinion, the pertinent facts are detailed which are held to justify denial of the motion to remand. I dissent because they are deemed to be wholly insufficient.

The suit was brought by the administrator of the estate of the deceased on two causes of action. The first was to recover damages for the loss by the next of kin of decedent's life, for their benefit, pursuant to sections 824 and 825, Comp. Okl. Stat. 1921, which require an administrator, if appointed, to prosecute the action. The second was brought, as required, by the administrator to recover damages which accrued to the decedent for pain and suffering endured by him, as an asset of the estate. St. L. & S. F. R. Co. v. Goode, 42 Okl. 784, 142 Pac. 1185; Smith v. C. R. I. & P. Co., 42 Okl. 577, 142 Pac. 398. The joinder of the causes of action was authorized in the name of the administrator. Sections 266 and 211 C. O. S. 1921.

It is settled law that the citizenship of a personal representative and not that of the beneficiaries controls for purposes of jurisdiction when the former may sue under state law. Rose, Fed. Juris. & Proc., sec. 262; Memphis St. Ry. Co. v. Bobo and Moore, 232 Fed. 708; City of Detroit v. Blanchfield, 13 Fed. (2) 13; Mexican Cent. R. Co. v. Eckman, 187 U. S. 429; Memphis St. Ry. Co. v. Moore, 243 U. S. 299; Black v. Brown, 276 U. S. 518: In Oklahoma, an administrator is not a merely nominal party. By Section 1197, Ch. 5, Art. IV, C. O. S. 1921, the possession of the estate is vested in him, and it is his duty to collect the debts due the decedent or the estate.

Without reviewing the facts in opposition to the motion to remand, it is a sufficient answer, that the widow of the deceased was a party to plaintiff's appointment by her resignation and designation of him as her agent, counsel in soliciting his appointment is presumed to represent her in selecting him in her stead, his signature on the petition and bond for his appointment was not required by the laws of Oklahoma, he was qualified as a non resident (Secs. 1153 and 1141, Art. III, Ch. 5, C. O. S. 1921), the estate in Okla- [fol. 61] homa conferred jurisdiction to appoint him (Sec. 1088, Art. I, Ch. 5, C. O. S. 1921); the official oath taken by him obligated him to perform the duties of his trust, and there is no showing that the County Court did not direct this suit in his name.

The plaintiff's selection and appointment was not fraudulent, because a lawful act cannot be so regarded. The County Court alone had jurisdiction to make the ap-

pointment, it imported a finding of every essential jurisdictional fact, and it is not subject to collateral attack. Wolfe v. Gills, 96 Okl. 6, 219 Pac. 350. Until vacated by the County Court, the appointment stands as authoritative and binding in every other forum. It is immaterial that the object of the plaintiff's appointment was to defeat removal to the Federal Court, within the same principle that joining a defendant in a suit is not fraudulent, whatever the motive may be, if by the state law he has a joint liability. Illinois Central R. Co. v. Sheegog, 215 U. S. 308; Chic. B. & Q. R. Co. v. Willard, 220 U. S. 413. In my opinion, the judgment should be reversed, with direction to remand this case to the state court.

But if this be a mistaken view, and the case was removable, then the action itself should have been dismissed by the District Court, and we should reverse the judgment, with direction to dismiss it, because the defendant's position is necessarily that there is no competent party plaintiff. A Federal Court is bound of its own motion to dismiss a suit where jurisdiction is wanting. Sec. 80, U. S. Code. The defendant takes the inconsistent position that for the purpose of removal the plaintiff is not a competent party and yet for the purpose of a trial he is competent, and it is here insisting on an affirmance of the adjudication on the merits of the demands in suit. Either the action must be remanded or dismissed. The case of Cerro v. Akron People's Telephone Co., cited in the majority opinion, is authority for the dismissal of this case.

There were four prior suits. They were brought upon but one cause of action, the first in this suit, to which the second was added for the first time in this case. The defendant may have had ground to enjoin those suits as vexatious, but the remedy was waived. The right to dismiss a case without prejudice before submission is expressly authorized by the state law. Sec. 614, Ch. 3, Art. XXII, [fol. 62] C. O. S. 1921. There was no adjudication in those suits. They have no bearing in this controversy, are mere matters of aggravation and are of no consequence.

I am unable to find any claim to a separable controversy in the removal petition. However, if asserted there, it would be immaterial. Both causes of action, the second adopting the first, charged a joint liability against the de-

fendants. A defendant cannot make an action several which a plaintiff has elected to make joint. Rose, Fed. Juris. & Proc., Sec. 362; Terrence v. Shedd, 144 U. S. 527; Ches. & O. R. Co. v. Dixon, 179 U. S. 131; Illinois Central R. Co. v. Sheegog, supra; McAllister v. Ches. & O. R. Co., 243 U. S. 302.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Jan. 23, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, and that Fitzsimmons Drilling Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a Corporation, appellees, have and recover of and from William H. Mecom, Administrator of the Estate of Archie Lee Smith, appellant, their costs herein.

[fols. 63-98] Petition for Rehearing, covering 31 pages, filed February 9, 1931, omitted from this print. It was denied and nothing more by order; February 12, 1931.

[fol. 99] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 12, 1931

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed Feb. 16, 1931

Comes now the Appellant above named, and respectfully moves this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued out of said cause until the further order of the court, on [fol. 100] the ground and for the reason that Appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment rendered in favor of Appellees and against Appellant in the above entitled action, and:

Appellant further shows to the court that he is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

Wherefore, Appellant prays that the court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action until the further order of the court, and that the court fix the amount of the bond required of Appellant, and that he be given a reasonable time in which to make, execute and file said bond.

Roy F. Ford, S. J. Montgomery, Ted Haugh, A. H. Meyer, Attorneys for Appellant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Roy F. Ford, upon oath says:

That he is one of the attorneys of record for the appellant in the above entitled action; that he served a copy of the above and foregoing motion upon appellees by mailing to H. C. Thurman, Oklahoma City, Oklahoma, and Ray S. Fellows, Tulsa, Oklahoma, counsel for Appellee, Fitzsimmons Drilling Company, Inc., and also served it on the Appellee, Atlantic Oil Producing Company, by mailing to its counsel, George F. Short and C. W. King, Oklahoma City, Oklahoma, and to H. H. Hagen and T. A. Gavin, Tulsa, Oklahoma, counsel for Appellees; said copies being mailed by regular United States mail with the postage duly paid

thereon, and the same having been deposited in the Post Office of Tulsa, Oklahoma, on February 13, 1931.

Roy F. Ford.

[fol. 101] Subscribed and sworn to before me this 13th day of February, A. D. 1931. Charlotte F. Basse, Notary Public. My commission expires Nov. 29, 1931. (Seal.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING STAY OF MANDATE—February 16, 1931

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 102] (Seal of the United States Circuit Court of Appeals, Tenth Circuit.)

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,712. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 32. William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, petitioner, vs. Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company. Petition for a writ of certiorari and exhibit thereto. Filed March 12, 1931. File No. 35,712.

FILE COPY

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CHARLES ELMORE C

No. [redacted] 32

In the Supreme Court of the United States

October Term, 1930.

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROY F. FORD,
S. J. MONTGOMERY,
Tulsa, Oklahoma,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. _____

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable CHARLES EVANS HUGHES, *Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:*

Your petitioner, William H. Mecom, as administrator of the estate of Archie Lee Smith, deceased, respectfully files and submits this as his petition for a writ of *certiorari* to review a decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit.

The Circuit Court of Appeals on January 20, 1931, by a divided court, affirmed a decision and judgment of the

District Court of the United States for the Western District of Oklahoma in favor of respondents herein and against petitioner. (R. 54-62, incl.) (Opinion not yet officially reported.)

Petition for a rehearing was later filed (R. 63-99, incl.) and was denied on February 12, 1931. The mandate has been stayed by proper order (R. 101) and the cause is now filed and docketed herein for decision.

Statement of Case.

Petitioner, as plaintiff, originally filed this action in a state court, to-wit, the District Court of Oklahoma County, State of Oklahoma, whereby in his amended petition (R. 2-8, incl.) he sought to recover damages for the wrongful death of one Archie Lee Smith. Two causes of action are set out in the amended petition, one for damages for the wrongful death of the deceased, which, under the statutes of Oklahoma, is for the exclusive benefit of the widow and children of said deceased; the other cause of action was for damages for pain and suffering which the deceased underwent from the time he was injured until he died, and for the benefit of the estate of said deceased.

Within the time allowed by law the respondents herein by petition (R. 8-25, incl.) removed said cause to the federal court on the ground of diversity of citizenship. It was admitted by the record that at the time of the filing of the amended petition, petitioner was a resident and citizen of the State of Louisiana; that the respondent, Fitzsimmons Drilling Company, Incorporated, a corporation,

was a resident and citizen of the same state as petitioner, to-wit, the State of Louisiana, while respondent Atlantic Oil Producing Company, was a resident and citizen of the State of Delaware. The widow and children of the deceased were residents and citizens of the State of Oklahoma.

Petitioner filed a motion to remand the case to the state court (R. 25-27, incl.) on the theory that no diversity of citizenship existed, as petitioner and one of the respondents were residents and citizens of the same state, to-wit, the State of Louisiana, while the respondents by their petition for removal contended that petitioner's citizenship and residence should be disregarded on the question of removability of the case, and that only the citizenship and residence of the next of kin or beneficiaries should be taken into account.

The District Court of the United States refused to remand the case to the state court (R. 33-34). Upon a trial in that court a judgment was rendered in favor of respondents and against petitioner (R. 40-41). An appeal was prosecuted to the Circuit Court of Appeals who affirmed the trial court.

Single Question Presented by Record.

The sole question presented in this case is the jurisdiction of the trial court to do any act in the case, except to have remanded it to the state court on proper application.

The Circuit Court of Appeals in affirming the judgment of the trial court held, in substance:

(1) "That where an administrator prosecutes an action for damages for wrongful death under the statutes of Oklahoma for the use and benefit of the next of kin of said deceased, that the administrator is a mere formal or nominal party and the citizenship and residence of the administrator should be disregarded, and only the residence and citizenship of the beneficiaries, or next of kin, should be taken into account in determining the jurisdiction of a United States District Court.

(2) "That although the probate statutes of the State of Oklahoma authorize the appointment of a non-resident administrator, that where several suits have been filed and dismissed and the purpose of having a foreign administrator appointed is to defeat the jurisdiction of a United States District Court and keep a case from being removed from the state to the federal court on the ground of diversity of citizenship, that the court would not permit this to be done, to avoid a removal."

The reason relied on for the allowance of this writ is the hopeless conflict of decisions in federal appellate courts.

The decision of the Circuit Court of Appeals in this case conflicts with the theory of several decisions of this court, and with at least two decisions of the Circuit Court of Appeals for the Sixth Circuit, as well as constructions placed upon the death statutes of Oklahoma by the highest court of that state.

The question of jurisdiction involved is most important, as we do not see how any United States District Court could pass upon a question of its own jurisdiction where an administrator is a party to a suit, and his residence and citizenship is different than that of the beneficiaries or next

of kin, without violating the rule laid down in at least some one of the conflicting opinions.

The death statutes of the State of Oklahoma are identical with the death statutes of the State of Indiana, and the Circuit Court of Appeals for the Sixth Circuit has construed the same death statutes in exactly the opposite way from the opinion of the Circuit Court of Appeals in this case, in the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud*, 114 F. 918.

Again the statutes of Oklahoma with reference to parties also provide in substance that an executor, administrator, guardian or trustee of an express trust may sue in his own name without joining the party for whose benefit the suit is prosecuted. The Circuit Court of Appeals failed and neglected to consider or construe this statute in its opinion, although it was called to its attention and although the State of Michigan has the identical statutes, which are construed as we contend for in this case, by the Circuit Court of Appeals for the Sixth Circuit in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 F. (2nd) 13.

The State of Texas also has substantially the same statute on parties, which was construed by the Supreme Court of the United States as we contend for, in the case of *Mexican Central Ry. Co.* v. *Eckman, Gdn.*, 187 U. S. 429, 23 Sup. Ct. Rep. 211, 47 L. ed. 245.

The Supreme Court of Oklahoma, the highest court of the state, in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, has substantially held that an administrator is not a formal or nominal party in a

suit brought for damages for wrongful death, because it is the administrator's duty to collect the money on the death claim, distribute the same to the proper parties who are entitled to it under the statute, and if he fails so to do that he is liable on his official bond.

The authorities cited in the majority opinion are not in point and do not support the conclusions therein reached, as will be pointed out in our brief in support of this petition.

The dissenting opinion by Judge COTTERAL in the case at bar follows the correct rules, and is supported by the authorities above mentioned, as well as others, and will be referred to in our brief.

This court at this time, and in this case, should settle once and for all time to come the hopeless conflict in the federal appellate court decisions, and answer the following question:

In determining the jurisdiction of a United States District Court on the ground of diversity of citizenship, whose citizenship and residence should govern where an administrator is a party to the suit—the administrator's residence and citizenship, or the citizenship and residence of the beneficiaries or next of kin?

A correct answer to the above question will necessarily dispose of both propositions discussed in the majority opinion hereinbefore referred to.

Assignment of Error.

Jurisdiction was wrongfully and unlawfully assumed and retained by the federal court in this case, in violation of the United States Judicial Code, and all of the federal appellate court decisions and opinions that we have been able to locate after an exhaustive search.

Reference to Record.

In this petition and brief in support thereof, we have attempted to comply with the rules of the court by making them as short and concise as possible, and will call to the attention of the court only a small portion of the large number of cases on the subject; however, we have collected substantially all of the cases digested on the proposition in our petition for rehearing (R. 63-99, incl.), which is set out in the certified copy of the record of the Circuit Court of Appeals for the Tenth Circuit filed herewith.

Wherefore, your petitioner respectfully prays that this petition be sustained and granted, and that a writ of *certiorari* issue in said cause, as provided by law, to the end that said cause may be reviewed and determined by this court; that upon final hearing the judgment of the Circuit Court of Appeals be reversed, with instructions to such appellate court to cause said cause to be remanded to the state court from whence it was wrongfully removed to the federal court, and petitioner prays for all other proper relief.

S. J. Montgomery,
Roy F. Ford,
Tulsa, Oklahoma,
Counsel for Petitioner.

VERIFICATION AND CERTIFICATE OF COUNSEL.

State of Oklahoma, County of Tulsa—ss.

Roy F. Ford and S. J. Montgomery, each for himself; upon oath say: That they are attorneys for petitioner in the foregoing petition; that they have read the said petition and have personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiants further state that the said petition for writ of *certiorari* is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to be vexatious or to delay the final opinion and judgment in the case.

ROY F. FORD,
S. J. MONTGOMERY.

Subscribed and sworn to before me this 2d day of March, A. D. 1931.

CHARLOTTE F. BASSE,
Notary Public.

(Seal)

My commission expires November 29, 1931.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

Two points are decided in the majority opinion in this case, which are referred to in the foregoing petition. We will answer these points in their order.

POINT I.

Sections 824 and 825 of the Compiled Oklahoma Statutes for the year 1921, on death, are in words and figures as follows, to-wit:

> "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased."
>
> "In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The majority opinion of the Circuit Court of Appeals holds that under these two statutes the administrator is a

mere nominal or formal party, and that his residence and citizenship should be disregarded in determining the jurisdiction of a United States District Court for diverse citizenship, and that only the residence and citizenship of the next of kin or beneficiaries should be taken into account.

The State of Indiana has identically the same death statutes as Oklahoma, and the Circuit Court of Appeals for the Sixth Circuit in construing the Indiana statutes construe them in exactly the opposite way to the Circuit Court of Appeals in the case at bar.

The case to which we refer is the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud,* 114 Fed. 819. The fourth paragraph of the syllabus of this latter case reads as follows:

> "The statute of Indiana (Burns' Rev. St. 1894, Par. 285), gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to 'the exclusive benefit of the widow and children, if any, or, next of kin, to be distributed in the same manner as personal property of the deceased.' *Held, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered, and that his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.*"

Ohio has substantially the same death statute as Indiana and Oklahoma, and it is construed the same as the In-

diana statute in the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465.

The highest state court of the State of Oklahoma in construing the death statutes of the state, which are the ones above set out, shows, we think, that an administrator is not merely a nominal or formal party, but is the real party in interest.

The Supreme Court of Oklahoma in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, lays down the following rules:

> "Under section 824, Compiled Oklahoma Statutes 1921, it is the duty of the administrator of the estate of a deceased person whose death was produced by the wrongful act of another to maintain a suit against such tort feasor when necessary to recover for the benefit of the next of kin the damages which they have thereby sustained, and to collect, receive, and distribute such moneys in proper proportion to the *cestui que trusts*. This section does not create a new office, but adds new duties to an old office, and for a dereliction in the performance of the duties thereof the administrator and the sureties on his official bond as administrator are liable."

Section 211, Compiled Oklahoma Statutes 1921, on parties plaintiff, provides as follows:

> "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued

in such name as is authorized by law, and official bonds may be sued upon in the same way."

This section was called to the attention of the Circuit Court of Appeals, but the majority opinion fails to take any notice whatever of it, although it is mentioned in the dissenting opinion of Judge COTTERAL.

The State of Michigan has this identical statute which was construed by the Circuit Court of Appeals for the Sixth Circuit in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13, wherein the court said:

> "Under Judicature Act, Mich. (Pub. Acts 1915, No. 314), c. 12, Sec. 12, providing that a guardian may maintain an action in his own name without joining his ward, for whose benefit it is brought, it is the citizenship of the guardian and not of the ward on which the jurisdiction of a federal court depends."

The Supreme Court of the United States has directly passed on this proposition also in the case of *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 23 S. Ct. Rep. 211, wherein the court said:

> "The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name."

Other late cases supporting our position on this question are:

Patch v. *Wabash Railway Co.*, 207 U. S. 277;
Memphis Street Ry. Co. v. *Moore*, 243 U. S. 299.

Cases Cited in Majority Opinion Not in Point, and Do Not Support Conclusion Reached.

The majority opinion cites the cases of *Stewart* v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 445; *Maryland* v. *Baldwin*, 112 U. S. 490, and a number of other cases as supporting the conclusions reached under the first proposition; however, a close examination of these cases shows that none of them are in point, as they are all cases where a state or some officer thereof, or a United States marshal or sheriff brings a suit for the benefit of some third person, and in that kind of a case it is held that the residence and citizenship of the party for whose benefit the suit is brought governs in determining the jurisdiction of a federal court on the ground of diversity of citizenship, and the name of the mere nominal or formal party will be disregarded. That is not the situation in this case, as has been clearly pointed out by the Supreme Court of the United States in at least two opinions, the first of which is *New Orleans* v. *Gaines*, 138 U. S. 595, 606, *sub. nom. New Orleans* v. *Whitney*, 34 L. ed. 1102, 1106, 11 Sup. Ct. Rep. 428, 431. Mr. Justice BRADLEY clearly points out the distinction between the cases cited in the opinion in the case at bar and the principle we herein contend for in the following language:

> "The most that can be said is that the subrogated creditor, by operation of law, represents the person to whose right he is subrogated. *But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receiv-*

ers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle.

"When, however, the state or the governor of a state is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship, Spear, Fed. Jud. 150, 152, and cases there cited; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Browne* v. *Strode*, 5 Cranch. 303; *Irvine* v. *Lowry*, 14 Pet. 293; *McNutt* v. *Bland*, 2 How. 9; *Huff* v. *Hutchinson*, 14 How. 586."

This case is cited with approval by Mr. Chief Justice FULLER in the case of *Mexican Central R. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. Rep. 211. This case was decided on January 5, 1903, and is later in point of time than any of the cases cited under the first proposition by the majority opinion.

In the course of the opinion Chief Justice FULLER said:

"It is true that where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the federal court depends, not on the relative situation of the parties concerned in interest, but on the relative situa-

tion of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines*, by Mr. Justice BRADLEY, 'We have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law'."

The distinction in the two classes of cases, perhaps, is best pointed out by Circuit Judge ROGERS in a later case, decided in 1920, by the Circuit Court of Appeals for the Second Circuit, wherein the two classes of cases are reviewed for more than the last hundred years. This is the case of *New York Evening Post Co.* v. *Chaloner*, 265 Fed. 204.

POINT II.

In discussing the second point or proposition, the majority opinion entirely overlooks the probate code of the State of Oklahoma and the legal rights granted thereunder, and the code is only incidentally mentioned in the majority opinion, although it is considered in the dissenting opinion by Judge COTTERAL, and the majority opinion, without citation of any authorities in point, holds that because the widow and her counsel filed four different lawsuits, which were removed to the federal court and later dismissed, and

then had a foreign administrator appointed with the motive, intent and purpose of defeating a removal of the case from the state to the federal court on the ground of diversity of citizenship, that it would not permit the jurisdiction of the federal court to be defeated on removal.

Probate Code of Oklahoma.

It will be necessary to examine certain sections of the probate code of the State of Oklahoma, Compiled Oklahoma Statutes, 1921.

Section 1079 defines the jurisdiction of the probate or County Court.

Section 1141 enumerates the parties entitled to be appointed as administrator of a deceased person's estate, and makes no distinction between resident or non-resident, but provides that any person legally competent may be appointed.

Section 1146 sets out the requisites of the petition.

Section 1153 provides for a waiver of a person entitled to appointment in favor of some other person.

Section 1159 sets out what a non-resident administrator must do before entering upon the performance of his duties, and reads as follows:

> "Every executor, administrator, or guardian, appointed in, but residing out of the state, shall, before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on

said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the County Court where such appointment is made."

Sections 1188 and 1189 show when a second administrator may be appointed when the first has become disqualified or has resigned.

Section 1197 defines the powers and duties of an executor or administrator.

All of the probate statutes were complied with to the letter in having petitioner herein appointed administrator of the estate by the county judge of Pawnee County, Oklahoma, the court having original jurisdiction to make the appointment. The appointment is regular on its face and cannot be collaterally attacked. The judgment appointing the administrator, petitioner in this case, is entitled to as much respect and consideration as any judgment ever rendered by any court.

Respondents attempted to attack collaterally the appointment by their petition for removal, and the evidence introduced in support thereof, which is prohibited by the Supreme Court of Oklahoma in two cases as follows:

Wolfe v. *Gills, et al.*, 96 Okl. 6, 219 Pac. 350;

In re Green's Estate, Green v. *Yearger*, 251 Pac. 1008.

The following federal courts have also held that a judgment and order appointing an administrator cannot be collaterally attacked in the federal court:

McGehee, et al., v. *McCarley*, 91 Fed. 462;
Northwestern Mutual Life Insurance Co. v. *Johnson*, 275 Fed. 757;
Smith v. *Jennings*, 238 Fed. 48.

Having an administrator or guardian appointed for the purpose of giving a federal court jurisdiction or avoiding it where it is authorized by the state law, does not constitute a fraud on the federal court.

—*City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13.

The joining of parties to a suit in the state court for the purpose of defeating a removal to the federal court is not fraudulent or illegal, whatever the motive may be, if it is authorized by the state law.

—*Illinois Central Ry. Co.* v. *Shegog*, 215 U. S. 308;
Chicago, Baltimore & Quincy Ry. Co. v. *Willard*, 220 U. S. 413.

In 1 C. J. 971, Par. 66, under title of actions, it is said:

"If plaintiff shows a good and valid cause of action his motive in bringing the action is entirely immaterial, and cannot be inquired into; and it is no defense that he was actuated by improper motives, or malice, or a desire for revenge. These rules apply in equity as well as at law if the action is to enforce a clear equitable right."

The Circuit Court of Appeals for the First Circuit, in the case of *Johnson* v. *King-Richardson Co.*, 36 Fed. (2d) 675, approves the foregoing statement, and says:

"Where suitor is entitled to relief in respect to matter concerning which he sues, his motives are immaterial, and legal pursuit of his rights, no matter what his motive in bringing action, cannot be deemed either illegal or inequitable, and he may always insist upon his strict rights and demand their enforcement."

A late case decided by this court, that of *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 48 Sup. Ct. Rep. 404, 276 U. S. 518, is more nearly in point than any that can be found which determines this proposition, in our opinion. The first and second paragraphs of the syllabus in this case are as follows:

"'Where, in action by taxicab company to prevent interference with carrying out of contract with railroad, brought in federal court, in Kentucky, requisite diversity of citizenship existed, and controversy was real and substantial, court, in determining jurisdiction, will not inquire into motives of plaintiff in reincorporating in Tennessee for purpose of suing in federal court.

"Co-operation between railroad and taxicab company to have rights of parties to contract between them determined by federal court by having latter reincorporate in another state for purpose of suing in federal court, *held* not improper or 'collusive,' within meaning of Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80)."

Can a litigant by exercising a right given him under a state law be guilty of a fraud on a federal court, although the litigant exercises such right with the purpose and intent of avoiding the jurisdiction of the federal court?

We think this question must be answered in the negative.

Conclusion.

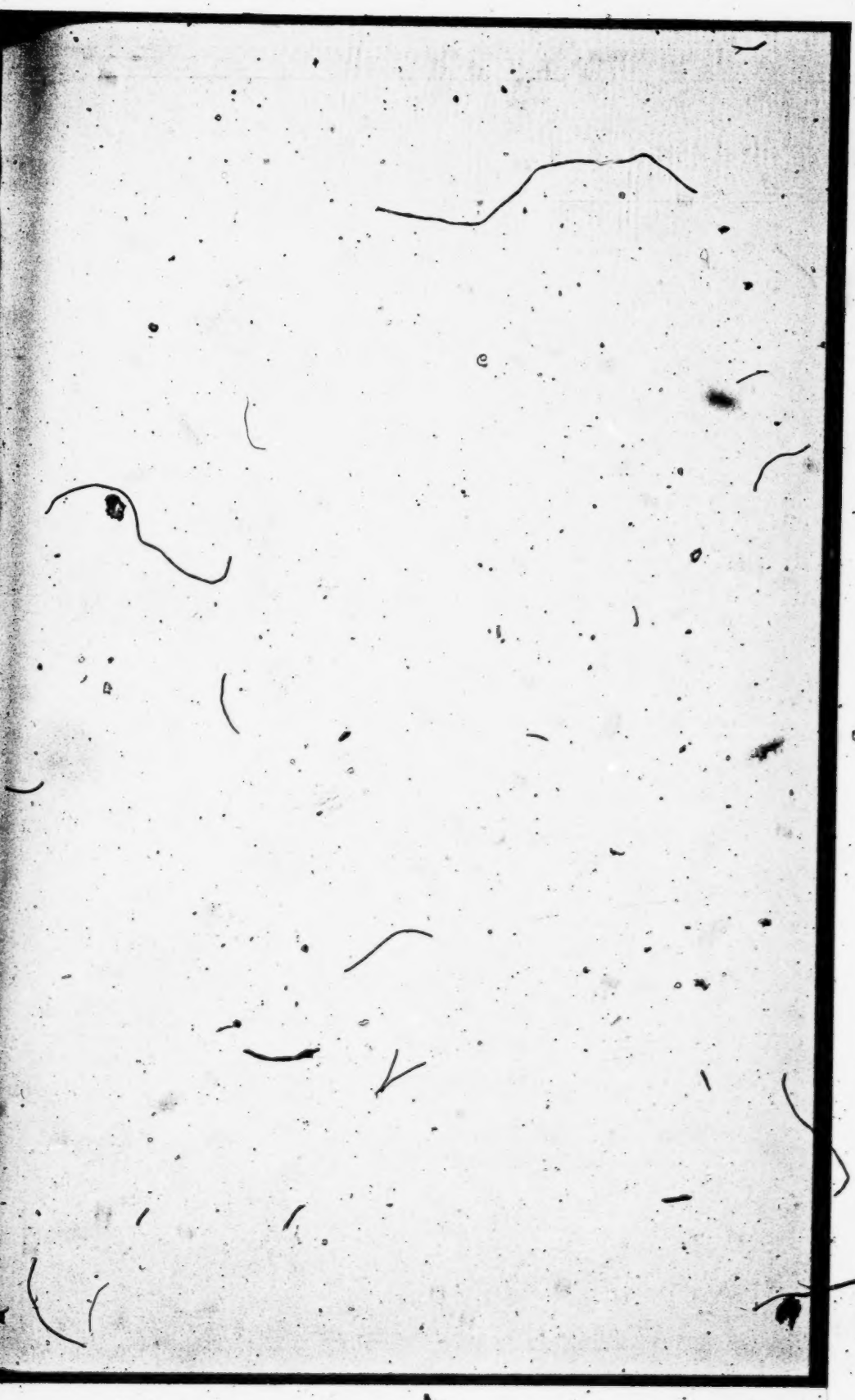
The conflict of original jurisdiction between a state and federal court is always an important question, and this is especially true where the estate of a deceased person may become involved. Everyone has to die sometime, and as soon as death occurs the estate may become involved in litigation, either in a state or federal court.

Until the Circuit Court of Appeals handed down the opinion in this case the law was clear on the question of original jurisdiction between a state and federal court on removal where an administrator was a party to the suit, but is now in hopeless conflict.

There has not been a recent opinion by the Supreme Court of the United States on this question, and we believe that on account of the uncertainty and diversity of opinion between the federal appellate courts on the question of jurisdiction and the importance of the matter involved, which may arise in any one of the United States District Courts at any time, that this court should grant this petition, decide the case on its merits, and forever settle the question.

Respectfully submitted,

ROY F. FORD,
S. J. MONTGOMERY,
Tulsa, Oklahoma,
Counsel for Petitioner.



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No. 32

In the Supreme Court of the United States

October Term, 1931.

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT OF PETITIONER.

ROY F. FORD,
S. J. MONTGOMERY,
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A. H. MEYER,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 32

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT OF PETITIONER.

May It Please the Court:

This case presents error on writ of *certiorari* to the United States Circuit Court of Appeals, Tenth Circuit, *certiorari* having been granted by this court in cause No. 790, October term, 1930, on April 20, 1931 (R. 62), 51 Sup. Ct. Rep. 488, ... U. S. ...

The Circuit Court of Appeals, Tenth Circuit, on January 20, 1931 (R. 51-60), by a divided court, 47 Fed. (2) 28,

affirmed a judgment against petitioner theretofore rendered in the cause by the United States District Court, Western District of Oklahoma (R. 60), which court assumed jurisdiction of the case on removal from a state court of the State of Oklahoma.

Statement of Case and Abstract of Record.

It will not be necessary to set out either the pleadings or the record in the trial court herein in full, but only the pertinent facts which are practically agreed upon.

This action was originally filed in the District Court of Oklahoma County, State of Oklahoma, by petitioner as plaintiff. Later an amended petition was filed in the case (R. 2-8).

The respondents, who were the defendants in the case, by joint petition for removal (R. 9-23), which petition was based on the ground of diversity of citizenship, removed said cause to the United States District Court, Western District of Oklahoma.

Petitioner by written verified motion sought to remand the case to the state court (R. 24-26). A verified response to the motion to remand was filed (R. 27-32).

Petitioner's suit was an action for damages under the statutory law of the State of Oklahoma on account of the wrongful death of one, Archie Lee Smith, an employee, who was injured on account of the alleged negligence of the defendants, their servants, agents and employees, on May 24, 1927, and which injuries caused his death the following day.

Two causes of action are set out in the petition. The first being for the sum of $100,000.00 damages *for the use and benefit of the next of kin of said deceased*, who were as follows, to-wit:

Lillian Smith, widow,
Donna G. Smith, minor daughter,
Welford Smith, minor son.

All of said next of kin being residents and citizens of the State of Oklahoma.

The second cause of action set out was for $3,000.00 damages for the pain and suffering which the deceased underwent from the time he was injured until he died, *and was for the use and benefit of the estate of said deceased.*

It is admitted that petitioner at the time of the filing of the case in the state court was the duly appointed, qualified and acting administrator of the estate of the deceased, having been duly appointed as such by the honorable County Court of Pawnee County, State of Oklahoma, before the suit was instituted, and on December 10, 1928, the court having jurisdiction to make said appointment, and was appointed at the written request of the surviving widow of said deceased, Lillian Smith, who had previously been the personal representative of her deceased husband's estate, but who on the last mentioned date before petitioner was appointed administrator of said estate, resigned in writing.

The defendants by their petition for removal and at the hearing on the motion to remand claimed that the resignation by the widow and the appointment of petitioner as administrator of said estate was a device and scheme, and

constituted a fraud on the part of the said widow and her counsel to deprive the federal court of jurisdiction in this case on removal, and the defendants set out in said removal petition the fact that some four other lawsuits had been filed by the widow as administratrix seeking to recover on the first cause of action set out in petitioner's amended petition, which actions had all been removed to the federal court and dismissed by the plaintiff therein prior to the institution of the present suit, but it was agreed that none of the four cases had contained a cause of action the same or similar to the second cause of action set out in petitioner's petition.

The defendants to further substantiate their petition for removal and on the hearing of petitioner's motion to remand, showed that the petitioner had consented to act as administrator of the estate of said deceased at the request of counsel for Mrs. Smith, the widow of said deceased. That he signed some papers, which consisted of an oath as administrator, a power of attorney in favor of Mrs. Smith, and that he signed an instrument appointing Mrs. Smith as his agent in Oklahoma as provided by the probate code of that state. The petitioner further stated that he did not sign a petition for his appointment as administrator and did not remember signing the bond, and it was admitted that he did not sign either instrument, but that his name was signed to the petition and bond by counsel, however, on December 26, 1928, he signed his oath, which was after the bond and petition had been signed and filed, and after petitioner had been appointed administrator of said estate.

That petitioner had no information about the estate and that he did not at any time enter into any agreement with counsel to procure his appointment as administrator, or to file the present action, and that he did not advance or provide any cost deposit. That he was not related to or acquainted with the widow of the deceased, and that the deceased left no estate in the State of Louisiana as far as he knew. That he did not have any contract for any fees or expect any fee for his acting as administrator.

The defendants at no time charged that the attorneys for petitioner were without authority to file and prosecute the present action, and whenever the time comes that the attorneys representing petitioner are required to show their authority so to do, it will be shown.

The petitioner at all stages in this case has contended that all of the claims and assertions of the defendants were immaterial, and constituted a collateral attack upon the judgment of the County Court of Pawnee County, Oklahoma, appointing petitioner administrator of the estate of said deceased, and contended that the acts set out in the defendants' joint petition for a removal with reference to the appointment of petitioner as administrator did not constitute any fraud upon the rights of the defendants, the court or anyone else, and that the resignation of the widow as administratrix of her deceased husband's estate and the appointment of petitioner were within the exclusive jurisdiction of the County Court or Probate Court of Pawnee County, State of Oklahoma, and was legal and authorized by the probate code of the State of Oklahoma.

It was agreed by the parties to the record at all stages of the proceedings in the United States District Court, Western District of Oklahoma, that petitioner, administrator and the defendant, Fitzsimmons Drilling Company, Inc., a corporation, were bona fide residents and citizens of the same state, to-wit, the State of Louisiana, and that the defendant, Atlantic Oil Producing Company, a corporation, was a bona fide resident and citizen of the State of Delaware.

Petitioner's motion to remand was denied by the court (R. 32). The defendants then filed their separate answers, which are identical (R. 33-39), and contained the following defenses:

1. A general denial.
2. Plea of contributory negligence.
3. Assumption of risk by the deceased.

The affirmative defenses of the separate answers were denied by petitioner's reply (R. 39).

On December 18th, 1929, the case was regularly tried before the Honorable T. Blake Kennedy, assigned district judge, and a jury. Immediately after the jury was impanelled, petitioner renewed his motion to remand to the state court, which was denied and an exception allowed.

Petitioner then introduced his evidence and rested, and again moved the court to remand said cause to the state court for lack of jurisdiction, which motion was denied, and petitioner excepted thereto. The defendants thereupon separately demurred to the petitioner's evidence, the court

sustained the same, dismissed petitioner's action and rendered judgment for the defendants which was excepted to by the petitioner and an exception allowed.

The court's judgment is found at record, page 39. Petitioner took the necessary and proper proceedings to appeal from the judgment to the Circuit Court of Appeals for the Tenth Circuit, and the appeal was duly lodged in that court.

As heretofore stated, the judgment was affirmed. A petition for a rehearing was filed and denied (R. 60).

Petition for *certiorari* to this court was granted and the case has been properly docketed for decision.

ASSIGNMENT of ERROR.

The sole question involved by this appeal is the jurisdiction of the trial court to do anything in the case except to remand the same to the state court from whence it was removed because of lack of jurisdiction of the parties to the record, on account of the petitioner and one of the defendants being residents and citizens of the same state, to-wit, the State of Louisiana.

ARGUMENT and AUTHORITIES.

The death statutes of the State of Oklahoma are very similar to the Federal Employer's Liability Act where death does not result immediately. Statutes on survival of actions necessary to be considered are sections 822, 823, 824 and 825 of the Comp. Okla. Stats. 1921, and are in words and figures as follows, to-wit:

"822. *Actions That Survive.* In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.

"823. *Actions Which Abate on Defendant's Death.* No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant.

"824. *Action for Death by Wrongful Act.* When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

"825. *Same—Who May Sue.* In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

These statutes have been construed a number of times by the highest state court of the State of Oklahoma. The identical statutes from an earlier code of the state are construed in the case of *St. Louis & S. F. R. Co. v. Goode*, 42 Okl. 784, 142 Pac. 1185.

The first, second and third paragraphs of the syllabus of that case are as follows:

"The right of action of a person injured through the wrongful act of another, to recover the damages sustained thereby, existed at common law, but abated upon the death of such injured person. This common law right of action survives, and is thus preserved, in the personal representative of decedent, by the terms of sections 5943, 5944, Comp. Laws 1909, and the cause of action and its survival are quite independent of sections 5945, 5946, Comp. Laws 1909, relating to the recovery of damages for the benefit of certain beneficiary therein named. And such action may be prosecuted to final judgment by the administrator, notwithstanding that death resulted from such injuries.

"The damages recoverable in such action, when revived, are only such as were sustained by the injured person in his lifetime (such as accrued in the period between the injury and his death), and when recovered are assets of his estate, and are not for the benefit of

the widow and next of kin, except as they may take as heirs upon the final distribution of the estate.

"Sections 5945, 5946, Comp. Laws 1909 (sections 5281, 5282, Rev. Laws 1910), create a new cause of action, to be prosecuted for the exclusive benefit of the beneficiaries named therein; the damages recovered in such suit do not become assets of decedent's estate. Such action is not dependent upon any common law right, and the right to maintain same is independent of sections 5943, 5944, Comp. Laws 1909. Nor will a recovery under these sections for the benefit of the widow and next of kin bar a recovery for the benefit of the estate of decedent, on account of the suffering and loss the decedent sustained through the injuries wrongfully inflicted on him, where death was not instantaneous."

In the case of *Smith* v. *Chicago, R. I. & P. Ry. Co.*, 42 Okl. 577, 142 Pac. 398, the court laid down the rule in the sixth paragraph of the syllabus as follows:

"Under section 5281, Rev. Laws 1910, damages recovered must inure to the exclusive benefit of the widow and children, but such widow and children, suing in such capacity for the pecuniary loss sustained by them in the death of the husband and father, cannot recover for mental anguish and suffering, because whatever may be recovered for mental anguish and suffering belongs to the estate of deceased and not exclusively to the widow and children, and should be recovered in a separate action."

Where an administrator has been appointed he is the only person that can prosecute either action given by the survival statutes, and in order for the widow to maintain the action for damages for wrongful death, she must plead

and prove that no personal representative has been appointed.

This rule was laid down in the case of *Sanders, et al., v. Chicago, R. I. & P. Ry. Co.*, 66 Okl. 313, 169 Pac. 891, wherein the court said:

> "Under sections 5281 and 5282, Revised Laws 1910, an action for damages for wrongful death may be brought by the widow or by the next of kin where there is no personal representative, and in such action it is necessary to plead and prove that no personal representative is or has been appointed.
>
> "Where the evidence in such an action fails to establish that no personal representative is or has been appointed, a demurrer thereto was properly sustained."

The foregoing statutes have been construed a number of times by the Supreme Court since the advent of statehood, but the holdings are consistent and we will not further burden the court with citations of authority.

Under the foregoing sections an administrator suing for damages for wrongful death is never a naked trustee or mere nominal party, as contended for by the defendants and as held by the Circuit Court of Appeals in this case, in the majority opinion.

We think this is clear from the holding the Supreme Court in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, wherein the court says:

> "Under section 824, Compiled Oklahoma Statutes 1921, it is the duty of the administrator of the estate of a deceased person whose death was produced by the

wrongful act of another to maintain a suit against such tortfeasor when necessary to recover for the benefit of the next of kin the damages which they have thereby sustained and to collect, receive, and distribute such moneys in proper proportion to the *cestui que trusts*. This section does not create a new office, but adds new duties to an old office, and for a dereliction in the performance of the duties thereof the administrator and the sureties on his official bond as administrator are liable."

Petitioner was entitled to join his first and second causes of action in the same petition under sections 266 and 267, Comp. Laws of the State of Oklahoma for the year 1921 relating to pleadings, which are in words and figures as follows, to-wit:

"266. *Joinder of Causes of Action.* The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of any one of the following classes:

"*First.* The same transaction, or transactions, connected with the same subject of action.

"*Second.* Contracts, express or implied.

"*Third.* Injuries, with or without force, to person and property, or either.

"*Fourth.* Injuries to character.

"*Fifth.* Claims to recover the possession of personal property, with or without damages for the withholding thereof.

"*Sixth.* Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

"*Seventh.* Claims against a trustee, by virtue of a contract, or by operation of law.

"But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

"267. *Causes of Action to Be Numbered.* Where the petition contains more than one cause of action, each shall be separately stated and numbered."

Petitioner was also entitled to bring this action on his two causes of action in his own name without joining any other persons under sections 209 and 211, Comp. Okla. Stat. 1921, with reference to parties, which provide as follows:

"209. *Plaintiff to Be Party in Interest.* Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract."

"211. *Plaintiffs Not Personally Interested.* An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

A case directly in point construing the identical statutes as above with reference to parties which is in force and effect in the State of Michigan is the case of *City of Detroit, Michigan*, v. *Blanchfield*, decided by the Circuit Court of

Appeals for the Sixth Circuit, and reported in 13 Fed. (2d) 13.

The first paragraph of the syllabus of this case is as follows:

> "Under Judicature Act, Mich. (Pub. Acts 1915, No. 314), c. 12, par. 12, providing that a guardian may maintain an action in his own name without joining his ward, for whose benefit it is brought, it is the citizenship of the guardian and not of the ward on which the jurisdiction of a federal court depends."

This is a guardianship case. Of course, there would be no difference in a case prosecuted by an administrator as the words, administrator or executor, are used alongside the word "guardian" in the last quoted statutes. There could be no difference. And it will be observed that the Oklahoma statutes and the Michigan statutes are identical.

In the opinion the court said:

> "It is insisted that a federal court has no jurisdiction, for the reason that Marion Killackey, the minor, in whose interest the suit is brought, is a resident of the State of Michigan, and that, where the jurisdiction of a federal court depends upon a diversity of citizenship, the residence of the ward, and not of the guardian, controls.
>
> "Section 2 of chapter 12 of the Judicature Act of 1915 of the State of Michigan (Pub. Acts 1915, No. 314), provides that 'every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by a statute, may sue in his own name with-

out joining with him the party for whose benefit the action is brought.'

"It was held by the Supreme Court of the United States in *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 436, 23 S. Ct. 211, 47 L. ed. 243, that, where a guardian in the state of the forum has the legal right to bring suit in his own name, it is his citizenship, and not the citizenship of the ward, upon which the jurisdiction of the federal court depends. This is the latest decision of the Supreme Court to which our attention has been called, and is necessarily controlling. To the same effect is the decision of the Second Circuit Court of Appeals in *New York Evening Post Co.* v. *Chaloner*, 265 F. 204, 213. The opinion in *Toledo Traction Co.* v. *Cameron*, 137 F. 48, 69 C. C. A. 28, was apparently written without reference to the *Mexican Central Ry. Co.* case, then recently decided."

The foregoing case follows a leading case by this court, that of *Mexican Central R. Co.* v. *Eckman, Gdn.*, 187 U. S. 429, 23 S. Ct. Rep. 211, 47 L. ed. 245, wherein the court lays down the following rule:

"The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name."

We think under the Oklahoma statutes, *supra*, with reference to parties, the two foregoing cases are absolutely conclusive in this case; however, both of them are guardian cases, and we now desire to call to the court's attention some cases involving the proposition where an administrator is a party to the record.

A late case from this court is the case of *Memphis Street Railway Company* v. *Moore*, 243 U. S. 299, 37 Sup. Ct. Rep. 273. The opinion is by Justice CLARKE, and it is said:

> "The requisite diversity of citizenship to sustain federal jurisdiction must be deemed to exist where a citizen of Arkansas, in his representative capacity as administrator, under appointment by a probate court of Tennessee, sues a Tennessee corporation for wrongfully causing the death of his decedent, although by Tenn. Acts. 1903, Chap. 501, it is provided that 'whenever a nonresident of the State of Tennessee qualifies in this state as the executor or administrator of a person dying or leaving assets or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state,' in view of the declaration of the highest state court that the only purpose of this act is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in the act."

An opinion was also written in this case in the Circuit Court of Appeals for the Sixth Circuit, 232 Fed. 709, and Judge SESSIONS in his opinion says:

> "It is settled that the jurisdiction of the federal courts depends upon the personal citizenship of the parties to the record, and not upon the citizenship of the parties whom they represent. *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Amory* v. *Amory*, 95 U. S. 186, 24 L. ed. 428; *Mexican Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. ed. 245; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *C. H. & D. R. Co.* v. *Thiebaud*, (C. C. A. 6) 114 Fed. 918,

922, 52 C. C. A. 538; *Bishop* v. *B. & M. R. R.*, (C. C.) 117 Fed. 771."

The Circuit Court of Appeals for the Sixth Circuit in the year 1900 construed the death statute of the State of Indiana, which is almost identical with the Oklahoma death statute set out herein, in exactly the opposite way to which the Tenth Circuit construes the Oklahoma statutes in the case at bar.

The case to which we refer is the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud*, 114 Fed. 918. The fourth paragraph of the syllabus of that case is as follows:

"The statute of Indiana (Burns' Rev. St. 1894, Par. 285) gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to 'the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.' *Held, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered, and thus his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.*"

In the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465, it is said:

"Under Rev. St. Ohio, Sec. 6135, authorizing an action for death by wrongful act to be brought by the

administrator for the benefit of the next of kin the administrator is not a nominal party merely, but is the real party, and has control of, and is responsible for, the conduct of the case; and consequently, if a foreign administrator, he may bring the action in the federal court, although the beneficiaries reside in the state where the death occurred."

In the opinion the distinction between the principle we contend for and the rule laid down by the majority opinion in this case is clearly distinguished.

There are a number of respectable authorities supporting our position on this matter. We will not discuss them, but will merely give the court the citations:

Childress v. *Emory*, (Tenn., 1823) 8 Wheat. 642, 669, 5 L. ed. 705;

Rice v. *Houston*, (Tenn., 1871) 13 Wall. 66, 67, 20 L. ed. 484;

Blake v. *McKim*, (Mass., 1880) 103 U. S. 336, 26 L. ed. 563;

Dodge v. *Perkins*, (C. C. Mass., 1827) Fed. Cas. No. 3954;

Carter v. *Treadwell*, (C. C. N. H., 1843) Fed. Cas. No. 2480;

Hartman v. *Fishbeck*, (C. C. Wis., 1883) 18 Fed. 291;

McElmurray v. *Loomis*, (C. C. Ga., 1887) 31 Fed. 395;

Bangs v. *Loveridge*, (C. C. N. J., 1894) 60 Fed. 963;

Wilson v. *Hastings Lumber Co.*, (C. C. N. H., 1900) 103 Fed. 801;

McDuffie v. *Montgomery*, (C. C. Ill., 1904) 128 Fed. 105;

Lemon's Admr v. *Louisville & N. R. Co.*, (Ky., 1910) 125 S. W. 701;

Hill v. *Henderson*, (1846) 14 Miss. (6 Smedes. & M.) 351;

Geyer v. *John Hancock Mut. Life Ins. Co.*, (1871) 50 N. H. 224, 9 Am. Rep. 185;

Miller v. *Sunde*, (1890) 1 N. D. 1, 44 N. W. 301;

Middleton's Ex'rs v. *Middleton*, (Pa., 1878) 7 Wkly. Notes Cas. 144;

Susquehanna, etc., R. Co. v. *Blatchford*, (Pa., 1871) 11 Wall. 172, 20 L. ed. 179;

Bondurant v. *Watson*, (La., 1881) 103 U. S. 281, 26 L. ed. 447;

American Bible Soc. v. *Price*, (Ill., 1884) 110 U. S. 61, 3 S. Ct. 440, 28 L. ed. 70;

Hess v. *Reynolds*, (Mich., 1885) 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927;

Continental Ins. Co. v. *Rhoads*, (Pa., 1886) 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380;

Dodge v. *Perkins*, (C. C. Mass., 1827) 4 Mason 435, 7 Fed. Cas. No. 3954;

Cooke v. *Seligman*, (C. C. N. Y., 1880) 7 Fed. 263;

Whitman v. *Hubbell*, (C. C. Iowa, 1887) 30 F. 81;

Brisenden v. *Chamberlain*, (C. C. S. C., 1892) 53 Fed. 307;

Wilson v. *Smith*, (C. C. Pa., 1895) 66 Fed. 81;

Laubscher v. *Fay*, (D. C. Ohio, 1912) 197 Fed. 879;

Harper v. *Norfolk & W. R. Co.*, (C. C. Va., 1887) 36 Fed. 102;

Bishop v. *Boston & M. R. R.*, (C. C. Mass., 1902) 117 Fed. 771;

Holmes v. *Oregon & C. R. Co.*, (D. C. Or., 1880) 5 Fed. 75;

Patch v. *Wabash R. Co.*, (Ill., 1907) 207 U. S. 277, 28 S. Ct. 80, 52 L. ed. 204;

Neel v. *Pennsylvania Co.*, (Ohio, 1895) 157 U. S. 153, 15 S. Ct. 589, 39 L. ed. 654;

Amory v. *Amory*, (N. Y., 1877) 95 U. S. 186, 24 L. ed. 428.

We think the foregoing authorities are conclusive of the proposition that an administrator is not a nominal party plaintiff in a suit brought to recover damages for a wrongful death in the State of Oklahoma, however, we desire to enumerate some of the duties of an administrator seeking to recover damages on a wrongful death claim.

"*1st.* The administrator must either settle the claim for damages for wrongful death or institute an action in a court of competent jurisdiction to recover thereon.

"*2nd.* The contract of settlement, or the plaintiff in the cause of action if a suit is instituted, must run in the name of the administrator.

"*3rd.* The administrator at the time he is appointed must give a bond and take an oath, faithfully to discharge his duties. He is an officer of the court appointing him the same as a federal receiver.

"*4th.* If a settlement of a cause of action for death is consummated without a suit the administrator must properly distribute the fund received in settlement to the proper parties designated by the statute to receive the money, or if the administrator files an action to recover on the claim and does not happen to be an attorney himself, he must select an attorney, and it is his

duty to select a competent one to file and prosecute the action in a court of competent jurisdiction.

"*5th.* If the suit is filed in the name of the administrator, who is not a mere nominal party as we contend, then he must either negotiate for a settlement of the claim or make arrangements to secure witnesses and properly prepare the case for trial.

"*6th.* At the time the suit is instituted to recover damages for the wrongful death, the administrator must arrange to make a cash deposit for the costs, or execute a bond in lieu thereof, and he is absolutely liable for the costs in the case in the event it is not prosecuted to a successful determination in his favor.

"*7th.* If a recovery is had in the case so instituted by the administrator for damages for wrongful death and any money is paid in satisfaction of the judgment rendered either on the merits or an agreed judgment, it is then the duty of the administrator to pay his lawyer, and distribute the balance to the next of kin, and if any of the next of kin happen to be minors, it is the administrator's duty to see that a proper guardian is appointed and the money paid to the guardian so that the interests of the minors, who are next of kin, will be properly protected.

"*8th.* If the administrator fails to perform the foregoing duties, or any other, he and his bondsmen are liable on his official bond."

In view of the duties of an administrator in the handling of a claim for damages for wrongful death, only a few of which have been set out above, can it be said that an administrator is a mere nominal party?

Opinion of the Circuit Court of Appeals.

The dissenting opinion of Judge COTTERAL in the case at bar in our judgment lays down the correct rules and principles of law that should be applied in this case. We do not, however, agree with the majority opinion, and desire to discuss the propositions decided therein in this brief.

Cases Cited in Majority Opinion Not in Point, and Do Not Support Conclusions Reached.

The majority opinion cites the cases of *Stewart* v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 455; *Maryland* v. *Baldwin*, 112 U. S. 490, and a number of other cases as supporting the proposition, that the residence and citizenship of the beneficiaries or next of kin should control on the question of jurisdiction in place and instead of that of the administrator; however, a close examination of these cases shows that they are not in point, as they are all cases where a state or some officer thereof, or a United States marshal or sheriff brings a suit for the benefit of some third person, and in that kind of a case it is held that the residence and citizenship of the party for whose benefit the suit is brought governs in determining the jurisdiction of a federal court on the ground of diversity of citizenship, and the name of the mere nominal or formal party will be disregarded. That is not the situation in this case, as has been clearly pointed out by the Supreme Court of the United States in at least two opinions, the first of which is *New Orleans* v. *Gaines*, 138 U. S. 595, 606, *sub. nom. New Orleans* v. *Whitney*, 34 L. ed. 1102,

1106, 11 Sup. Ct. Rep. 428, 431. Mr. Justice BRADLEY clearly points out the distinction between the cases cited in the opinion in the case at bar and the principle we herein contend for in the following language:

> "The most that can be said is that the subrogated creditor, by operation of law, represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle.
>
> "When, however, the state or the governor of a state is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship. Spear, Fed. Jud. 150, 152, and cases there cited; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Browne* v. *Strode*, 5 Cranch. 303; *Irvine* v. *Lowry*, 14 Pet. 293; *McNutt* v. *Bland*, 2 How. 9; *Huff* v. *Hutchinson*, 14 How. 586."

This case is cited with approval by Mr. Chief Justice FULLER in the case of *Mexican Central R. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. Rep. 211. This case was decided on January 5, 1903, and is later in the point of time than any of the cases cited under the first proposition by the majority opinion.

In the course of the opinion Chief Justice FULLER said:

"It is true that where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines*, by Mr. Justice BRADLEY, 'we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law'."

Perhaps the best distinction of the two classes of cases is set out by an opinion by Circuit Judge ROGERS in a later case decided in 1920 by the Circuit Court of Appeals for the Second Circuit. In this case the distinction between the two classes of cases is reviewed for more than the last one hundred years.

The case which we have in mind is *New York Evening Post Co.* v. *Chaloner*, reported in the 265 Fed. 204. In this case, it is said:

"The Supreme Court has repeatedly held that representatives stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. *New Orleans* v. *Gaines' Administrator*, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. ed. 1102; *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 434, 23 Sup. Ct. 211, 47 L. ed. 245. This rule of construction was adopted as early as 1808 in the case of one suing as a trustee. *Chappedelaine* v. *Dechenaux*, 4 Cranch. 306, 308, 2 L. ed. 627. It was adhered to in 1923 in the case of an executor. *Childress* v. *Emory*, 8 Wheat. 642, 5 L. ed. 705. In the following year Chief Justice MARSHALL said that it had never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal courts could not be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 856, 6 L. ed. 204. In 1870 in *Coal Co.* v. *Blatchford*, 11 Wall. [illegible], 20 L. ed. 179, the question was whether the jurisdiction of the federal court depended upon the citizenship of the trustees who were the plaintiffs, or of the parties for whose benefit the suit was averred to be brought. And Mr. Justice FIELD speaking for the court declared that, if the trustees were personally qualified by their citizenship to bring suit in the federal courts, jurisdiction would not be defeated by the fact that the parties whom they represent were disqualified. And see *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Bonnafee* v. *Williams*, 3 How. 574, 577, 11 L. ed. 732. The applicability of the rule does not depend upon whether title is or is not in the representative. While title is in executors, administrators, and trustees, it is not in the guardians or in receivers. It is not of controlling importance therefore in the decision of this

particular question that the committee was not under the law of New York invested with the title to the plaintiff's property.

"The rule under consideration is not, however, applied in all cases. In 1809, *Browne* v. *Strode*, 5 Cranch. 303, 3 L. ed. 108, a case was certified to the Supreme Court from a federal court in Virginia. The action was on a bond given by an executor in conformity to a Virginia statute, the bond being executed to the justices of the peace for the County of Stafford and for the faithful execution of the testators. The suit was brought in the federal court by citizens of Virginia against a citizen of the same state for the benefit of a British subject. The Supreme Court ordered it certified that the court below had jurisdiction. No reason was assigned, but the case is explained in *Irvine* v. *Lowry*, 14 Pet. 293, 300, 10 L. ed. 462, where it is said that the plaintiff was a mere nominal party, a mere instrument through whom the legal right of the real plaintiff could be asserted. In 1852, *Huff* v. *Hutchinson*, 14 How. 586, 14 L. ed. 553, a United States marshal, even after he has gone out of office, was held competent to sue, in a United States court, on an attachment bond, citizens of the state of which he himself was a citizen at the time; the bond having been given for the benefit of the plaintiffs in the original action who were citizens of another state. The Supreme Court held that the real plaintiffs were those for whose use the suit was brought and who were averred to be citizens of New York, and that it was immaterial that the marshal and the defendants were alike citizens of Wisconsin; the marshal's relation to the suit being merely nominal.

"So in 1844 in *McNutt* v. *Bland*, 2 How. 9, 11 L. ed. 159, the plaintiff was the Governor of Mississippi and the action was brought in his name in a federal court

in Mississippi against certain defendants who were also citizens of the same state. The action was brought for the benefit of persons who were citizens of New York. The law of Mississippi required a bond to be given by all sheriffs to the Governor for the faithful performance of their duty. The action was brought against the sheriff and his sureties on the bond. The court in holding that the suit might be maintained stated that the Governor was 'a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff.' And Mr. Justice BALDWIN writing for the court further said:

'It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the Governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. * * * In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instruments of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party. Both look to things not names—to the actors in controversies and suits not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.'

"These cases have not, to our knowledge, been overruled. The committee appointed in New York does

not come within the exception of *Browne* v. *Strode* and the cases allied with it. The substitution of the committee in the place of the plaintiff would have destroyed the diversity of citizenship necessary to the maintenance of the action. And under the circumstances then existing the action should have been dismissed—without prejudice. To have done so would not have deprived Chaloner of any constitutional right to have his cause of action determined in a federal court. It would simply have postponed his right to proceed therein until he had taken the necessary steps in the courts of the State of New York to have the orders adjudging him of unsound mind and incompetent, and appointing a committee of his person and property, vacated; his sanity having been restored."

While the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465, is by a lower court, the reasoning in the opinion is so clear that we cannot keep from quoting it.

In this case the court says:

"It is said that the beneficiaries under the statute are the real parties in interest, and that federal jurisdiction, based upon diverse citizenship, has relation to the citizenship of the real parties in interest, and not to that of mere nominal parties; that the plaintiff is a mere nominal party, and, for aught that appears in the petition, the other beneficiary may be a citizen of Ohio, and therefore, jurisdiction not appearing upon the face of the petition, the action must be dismissed. The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party, so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, where the party actively conducting the litigation is doing it in the name of the state, in the name of a next

friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who institutes it, carries it on, and, with the sanction of the court, may compromise or dismiss it. She has absolute control of, and is responsible for, the conduct of the case. *Harper* v. *Railroad Co.*, 36 Fed. 102; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Knapp* v. *Railroad Co.*, 20 Wall. 117; *Chappedelaine* v. *Dechenaux*, 4 Cranch. 306; *Childress* v. *Emory*, 8 Wheat. 642; *Clarke* v. *Mathewson*, 12 Pet. 164; *Bonnafee* v. *Williams*, 3 How. 574; *Osborn* v. *Bank*, 9 Wheat. 738; *Irvine* v. *Lowry*, 14 Pet. 298; *Rice* v. *Houston*, 13 Wall. 66; *Davis* v. *Gray*, 16 Wall. 220; *Florida* v. *Anderson*, 91 U. S. 676; *Waldren* v. *Skinner*, 101 U. S. 589; *Davies* v. *Lathrop*, 19 Fed. 353; *Shirk* v. *City of La Fayette*, 52 Fed. 857; *Reinach* v. *Railroad Co.*, 58 Fed. 33; *Morris* v. *Lindauer*, 4 C. C. A. 162, 54 Fed. 23; *Bangs* v. *Loveridge*, 60 Fed. 963; *Pennington* v. *Smith*, 24 C. C. A. 145, 78 Fed. 399. In the *Stewart case*, 168 U. S. 445, 18 Sup. Ct. 105, the question was whether a cause of action, arising in Maryland, could be sued upon in the District Court of Columbia, owing to the peculiarities of the Maryland statute requiring suits to be brought in the name of the state. It was not a question of federal jurisdiction, and the court held that, the State of Maryland not being the beneficiary of the fruits of the litigation, the suit might be brought in the District of Columbia by the personal representative of the deceased. The case is thus stated in the digest:

'An action for death caused by negligence in Maryland where the statute provides for an action in the name of the state as nominal plaintiff, but for the benefit of certain prescribed heirs, is not such a special remedy for a purely statutory right of action as will prevent the maintenance of an action by the administrator in the District of

Columbia, where the statutes provide for actions by personal representatives in such cases for the benefit of certain prescribed heirs, although the beneficiaries may not be exactly the same under the two statutes.' 4 L. Co-op. & S. Dig., p. 59.

"In suits by the state on relation of A. B., or by a next friend, the state and the next friend are not real parties, in the sense that they have an interest in the result of the litigation, nor in the sense that they control the litigation; but executors, administrators, trustees, etc., although they have no personal interest in the fruits of the litigation, yet are real parties in the sense that they control, and are responsible for, the litigation."

The Four Cases Filed and Dismissed.

The filing and dismissal of the four suits prior to the bringing of the present action has no bearing on the question involved in this case, because the dismissal was authorized by the code of the State of Oklahoma and was with consent of the court, and was not objected to by the defendants.

Sections 664 and 665 of the Comp. Okla. Stats. 1921, provide as follows:

"664. *Action Dismissed, When.* An action may be dismissed, without prejudice to a future action:

"*First.* By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court.

"*Second.* By the court, where the plaintiff fails to appear on the trial.

"*Third.* By the court, for the want of necessary parties.

"*Fourth.* By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

"*Fifth.* By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

"*Sixth.* In all other cases, upon the trial of the action, the decision must be upon the merits."

"665. *Dismissal Without Order of Court.* A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervener or defendant to proceed with the action. Any defendant or intervener may, in like manner, dismiss his actions against the plaintiff, without an order of court, at any time before the trial is begun, on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the District Court, the judge or clerk of the County Court, or the justice, where the action is pending, who shall note the fact on the proper record.' *Provided*, such dismissal shall be held to be without prejudice, unless the words 'with prejudice' be expressed therein."

Fraud and Collusion of the Widow and Her Counsel.

In discussing this proposition it is necessary to examine certain sections of the probate code of the State of Oklahoma, which are found in Compiled Oklahoma Statutes 1921.

Section 1079 defines the jurisdiction of the County or Probate Court, as follows:

"*Probate Jurisdiction of County Court.* The county court has probate jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

"*First.* To open and receive proof of last wills and testaments, and to admit them to proof, and to revoke the probate thereof, and to allow and record foreign wills.

"*Second.* To grant letters testamentary, of administration and of guardianship, and to revoke the same.

"*Third.* To appoint appraisers of estates of deceased persons.

"*Fourth.* To compel executors, administrators and guardians to render accounts.

"*Fifth.* To order the sale of property of estates, or belonging to minors.

"*Sixth.* To order the payment of debts due from estates.

"*Seventh.* To order and regulate all distribution of property or estates of deceased persons.

"*Eighth.* To compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate or of a minor.

"*Ninth.* To exercise all the powers conferred by this article or by other law.

"*Tenth.* To make such orders as may be necessary to the exercise of the powers conferred upon it.

"*Eleventh.* To appoint and remove guardians for infants, and for persons insane or otherwise incompetent; to compel payment and delivery by them of money or property belonging to their wards, to control their conduct and settle their accounts."

Section 1141 enumerates the parties entitled to be appointed administrator of a deceased person's estate, as follows:

"*Who Entitled to Letters of Administration.* Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

"*First.* The surviving husband or wife, or some competent person whom he or she may request to have appointed.

"*Second.* The children.

"*Third.* The father or mother.

"*Fourth.* The brothers.

"*Fifth.* The sisters.

"*Sixth.* The grandchildren.

"*Seventh.* The next of kin entitled to share in the distribution of the estate.

"*Eighth.* The creditors.

"*Ninth.* Any person legally competent.

"If the decedent was a member of a partnership at the time of his deceased, the surviving partner must in no case be appointed administrator of his estate."

Section 1153 provides for a waiver of a person entitled

to appointment in favor of some other person not entitled thereto, and reads as follows:

> "*Specific Waiver by Person Entitled.* Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits or depositions taken *ex parte* before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court."

Section 1159 sets out what a non-resident administrator must do before entering upon the performance of his duties, as follows:

> "*Non-resident Must Appoint Agent.* Every executor, administrator or guardian appointed in, but residing out of the state, shall, before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the County Court where such appointment is made."

Sections 1188 and 1189 show when a second administrator may be appointed when the first has become disqualified or has resigned, and are as follows:

"*New Administrators Appointed, When.* If all such executors or administrators die or become incapable, or the power and authority of all of them are revoked, the proper court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions as hereinbefore required of administrators, and shall have the like power and authority."

"*Resignation and Settlement.* Any executor or administrator may, at any time, by writing, filed in the County Court, resign his appointment, having first settled his account and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may at any time before the settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment or resignation."

Section 1197 defines the powers and duties of an executor or administrator, as follows:

"*Powers and Duties of Executors and Administrators.* The executor or administrator must take into his possession all the estate of the decedent, real and per-

sonal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the executors or administrators, is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purpose of administration, as provided in this chapter."

All of the foregoing provisions of the probate code of the State of Oklahoma were complied with in having the petitioner appointed administrator of the estate of said deceased, and the judgment is not subject to a collateral attack in this case.

In the case of *Wolfe v. Gilles, et al.*, 96 Okl. 6, 219 Pac. 350, the court said:

"Where, in a regular proceeding in a County Court of this state for the appointment of an administrator, an order appointing an administrator is entered, such appointment is a finding of every jurisdictional fact necessary to such appointment, and the order is not subject to collateral attack on the ground that the deceased was not a resident of the county where the appointment is made.

"Under section 1088, Comp. Stat. 1921, jurisdiction of the estate of a deceased citizen is based, not upon the existence of assets, but upon domicile in the county, and it is therefore not necessary that there should be assets of the decedent in order for an administrator to be appointed. While it would be an abuse of discretion for a County Court to appoint an administrator for a deceased resident of the county where there

is no estate, or other statutory ground for the appointment, such appointment would not be void.

"Where a judgment is entered in a court of general jurisdiction and the record is silent as to the existence of the facts that gave the court jurisdiction, it will be presumed that all the facts necessary for the proper rendition of the judgment have been found to exist before the judgment was rendered."

To the same effect is the case of *In re Green's Estate; Green v. Yearger*, 114 Okl. 283, 251 Pac. 1008.

The federal courts are in entire accord with the Supreme Court of Oklahoma in holding that an order and judgment of a probate court in appointing an administrator cannot be collaterally attacked.

In the case of *McGehee, et al.*, v. *McCarley*, 91 Fed. 462, the Circuit Court of Appeals for the Fifth Circuit said:

"The validity of the appointment of an administrator, made by a court of general probate jurisdiction, cannot be questioned collaterally in an action brought by such administrator to recover for the tortious killing of his decedent, it not appearing but that a judgment in the action would render the matters involved *res judicata*."

In the opinion it is said:

"The appointment of the administrator should not have been inquired into collaterally in this case. The court which appointed him had general probate jurisdiction. It has not been shown that a final determination in this cause, as between McCarley, suing as administrator, and the plaintiffs in error, would not be *res judicata*, and a complete protection against another suit for the same cause of action. This protection is all

the interest which the plaintiffs in error have in the point."

In the case of *Northwestern Mutual Life Insurance Co.* v. *Johnson*, 275 Fed. 757, the Circuit Court of Appeals for the Eighth Circuit said:

> "Since Iowa District Courts are courts of record with power to appoint administrators of the estates of deceased persons, their judgments in making such appointments are not subject to collateral attack."

To the same effect are the following:

Garrett v. *Boeing*, 68 Fed. 51;

McCants v. *Peninsula Land Co.*, 68 Fed. 66;

American Car & Fdry. Co. v. *Anderson*, 211 Fed. 301;

In re Agnew, 225 Fed. 650.

There is only one other case we will call to the attention of the court on this proposition.

In the case of *Smith* v. *Jennings*, 238 Fed. 48, the following is said:

> "Where temporary administrators were appointed by the court of ordinary of Georgia for the county in which the estate of decedent lay, the federal court cannot take jurisdiction of a bill involving the administration of the estate, on the theory that such temporary administrators were not officers of the court because of irregularities and fraud in their appointment, for, the court of ordinary being a court of competent jurisdiction, its appointment could not thus be collaterally attacked.

"Though administrators are acting under temporary letters, which might have been issued by the clerk, but were issued by the ordinary, they are nevertheless officers of the court of ordinary, and a contrary claim, as a basis for the federal court's taking jurisdiction of a suit involving the estate, cannot be supported.

"Where temporary administrators had given adequate bond, and additional temporary administrators, who were qualified to act, had been appointed, the right of the original temporary administrators cannot be questioned in a suit where it was sought to secure the appointment of a receiver by the federal court on the ground that such administrators had received their appointment through fraud and irregularities."

The appointment of petitioner as administrator of the estate of the deceased was made by the county judge of Pawnee County, State of Oklahoma, and he alone could make this appointment while discharging his duties as a sworn official of the State of Oklahoma.

It was the County Court's duty to make an independent investigation for himself as to the fitness of the petitioner to act as administrator, and then to determine whether or not his appointment was for the best interests of the estate.

It was a matter exclusively within his power, and upon that judge and him alone rested the duty to determine the reasons why the petitioner should or should not be appointed. He appointed the petitioner, who then became an officer of the court the same as a receiver appointed by a federal court is an officer of the court appointing him. Every presumption must be indulged in favor of the judgment.

The plaintiff was legally appointed administrator of the deceased's estate. He was appointed in pursuance of the statutory provisions of the State of Oklahoma hereinbefore set out by a court having competent jurisdiction to make the appointment, and the defendants have no right to complain in this case.

The widow and her counsel could do nothing about the appointment because the power rested on the county judge. Of course, the widow and her counsel had a right to suggest his name to the court and ask the court to make the appointment, but when the appointment was finally made it must be made by a judicial officer acting, not in his individual capacity, but in his official capacity.

This judgment of the County Court made in pursuance of the state statutes is entitled to as much consideration and respect as any judgment ever rendered by any other court.

United States District Courts are given exclusive jurisdiction in bankruptcy matters the same as County Courts of Oklahoma are given exclusive jurisdiction in probate matters, and in our opinion, a federal court has no more right to collaterally attack an order and judgment of the County Court of Oklahoma in a probate matter, than the County Court of Oklahoma would have to collaterally attack an order and judgment of the United States District Court in a bankruptcy matter. We can see no difference as both are courts of exclusive jurisdiction in the particular matters conferred upon them.

A comprehensive discussion of the question of fraud in the appointment of an administrator or guardian is set out in the opinion in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13.

In the opinion it is said:

"The appointment of a guardian is a matter wholly within the jurisdiction and control of the state court. A federal court has no authority to control the discretion of a state court in making such appointment, or designate who shall or who shall not be appointed as guardian. The probate court of Wayne County has jurisdiction, not only to appoint a guardian for this minor, but also the authority to determine for itself the reasons for the appointment. Blanchfield may have been under the impression that he was appointed for the purpose of bringing this action in the federal court, but the court that appointed him may have done so for wholly different reasons.

"The fact that an alien or a non-resident of the state, if appointed guardian, may bring an action in the federal court, is not necessarily a valid objection to his appointment. It is a matter that may be considered by the court making the appointment, in connection with the character and qualification of the persons appointed and the best interest of the ward. Nor is the fact that this minor, or her counsel representing her, desire to bring this action in federal court, and were in part influenced by this consideration to request the appointment of Blanchfield as guardian, of itself a sufficient reason for the dismissal of this suit on the ground of fraud or collusion."

The majority opinion practically admits that the only case cited on this proposition is not in point and we doubt

if one can be found; however, legal principles that are in point can be found, and in 1 C. J. 971, Par. 66, under title of actions, it is said:

> "If plaintiff shows a good and valid cause of action his motive in bringing the action is entirely immaterial, and cannot be inquired into; and it is no defense that he was actuated by improper motives, or malice, or a desire for revenge. These rules apply in equity as well as at law if the action is to enforce a clear equitable right."

The Circuit Court of Appeals for the First Circuit, in the case of *Johnson* v. *King-Richardson*, 36 Fed. (2d) 675, approves the foregoing statement, and says:

> "'Where suitor is entitled to relief in respect to matter concerning which he sues, his motives are immaterial, and legal pursuit of his rights, no matter what his motive in bringing action, cannot be deemed either illegal or inequitable, and he may always insist upon his strict rights and demand their enforcement."

This court has frequently held that the joining of a defendant of the same residence and citizenship as the plaintiff in a suit is not fraudulent whatever the motive may be, if by the state law he has a joint liability.

—*Ill. Cent. Ry. Co.* v. *Sheegog*, 215 U. S. 308, 30 Sup. Ct. Rep. 101, 54 L. ed. 208;

Chicago, B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521.

A late case decided by this court, that of *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 48 Sup. Ct. Rep. 404, 276 U. S. 518, is more

nearly in point than any case that we have been able to find which determines the proposition in our opinion.

The first and second paragraphs of the syllabus of this case are as follows:

"Where, in action by taxicab company to prevent interference with carrying out of contract with railroad brought in federal court, in Kentucky, requisite diversity of citizenship existed, and controversy was real and substantial, court, in determining jurisdiction, will not inquire into motives of plaintiff in reincorporating in Tennessee for purpose of suing in federal court.

"Co-operation between railroad and taxicab company to have rights of parties to contract between them determined by federal court by having latter reincorporate in another state for purpose of suing in federal court, *held* not improper or 'collusive,' within meaning of Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80)."

In the opinion it is said:

"Section 37 of the Judicial Code (28 U. S. C. A., Sec. 80) requires any suit commenced in a District Court to be dismissed, if it shall appear that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in such court. The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid, and claims to be entitled, without the consent of the railroad company, to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights it granted. The mo-

tives which induced the creation of respondent to become successor of its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. *McDonald* v. *Smalley, et al.*, 1 Pet. 620, 624, 7 L. ed. 287. It is enough that respondent is the real party in interest. *Smith, et al.*, v. *Kernochen*, 7 How. 198, 216, 12 L. ed. 666. The incorporation of respondent or its title to the business and contract in question is not impeached.

"Co-operation between it and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of section 37. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110, 28 S. Ct. 219, 52 L. ed. 403; *Harkin* v. *Brundage*, February 20, 1928, 276 U. S. 36, 48 S. Ct. 268, 72 L. ed. 457; *South Dakota* v. *North Carolina*, 192 U. S. 286, 311, 24 S. Ct. 269, 48 L. ed. 448. It requires no discussion to distinguish *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444, and *Miller & Lux* v. *East Side Canal Co.*, 211 U. S. 293, 29 S. Ct. 111, 53 L. ed. 189. The District Court had jurisdiction."

Petitioner was actually appointed administrator of the estate of Archie Lee Smith, deceased, by the honorable County Court of Pawnee County, State of Oklahoma, the court having jurisdiction to make the appointment. The appointment was not feigned or merely colorable, but real, and under these circumstances the federal court has no right to inquire into the motive concerning said appoint-

ment. There is absolutely no distinction between the last cited case and the case at bar.

Conclusion.

We respectfully submit that had the deceased died leaving a will naming petitioner as executor and the will had been probated; and petitioner named executor of the estate of said deceased and this suit been filed under those circumstances and was being presented to this court, that the identical question would then be involved that is involved in this appeal. This, to our mind, shows that the alleged wrongful conduct of the widow and her counsel, complained of in this case, is entirely foreign to the legal question involved.

We believe that the law as applied to the record in this case is about as follows:

(1) That under the Oklahoma statutes cited herein in determining the jurisdiction of a United States District Court on the ground of diversity of citizenship where an administrator is a party to the record, that the administrator's residence and citizenship should govern in place and instead of that of the beneficiaries or next of kin.

(2) That a litigant by exercising a right given him under a state law cannot be guilty of fraud upon a federal court although the litigant exercises such right with the express purpose and intent of avoiding the jurisdiction of a federal court on removal.

We respectfully submit that this cause should be reversed with instructions that it be remanded to the state court, from whence it was wrongfully removed to the federal court.

Respectfully submitted,

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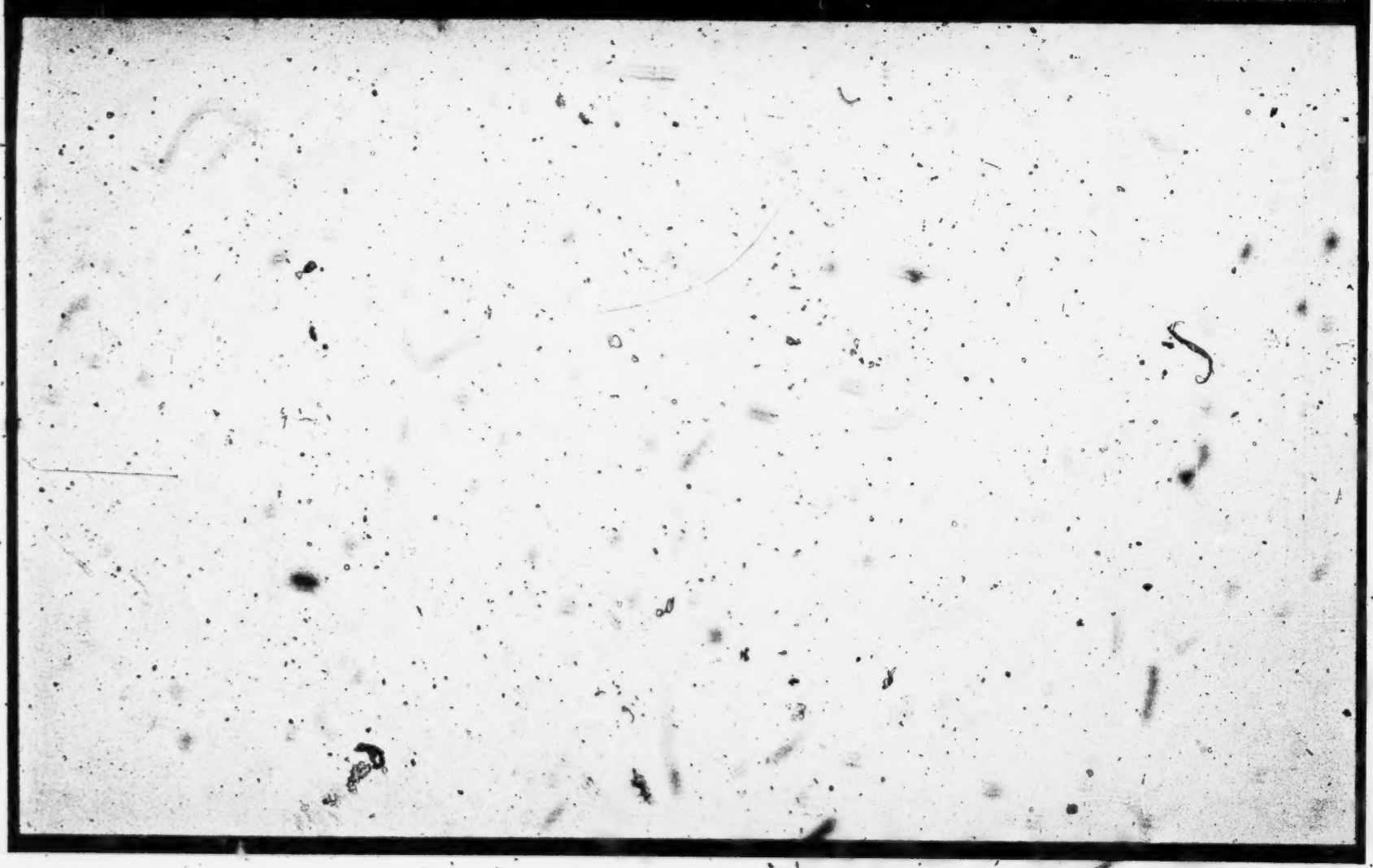

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No. 32

In the Supreme Court of the United States

October Term, 1930.

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 790

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Petitioner seeks a writ of *certiorari* on the ground that the holding of the Circuit Court of Appeals for the Tenth Circuit is in conflict with other federal appellate court decisions. The syllabus of the decision, which forms the basis of petitioner's complaint, is as follows:

> "*(1)* 'That where an administrator prosecutes an action for damages for wrongful death under the statutes of Oklahoma for the use and benefit of the next of kin of said deceased, that the administrator is a mere formal or nominal party and the citizenship and residence of the administrator should be disregarded, and

only the residence and citizenship of the beneficiaries, or next of kin, should be taken into account in determining the jurisdiction of a United States District Court.'

"(2) 'That although the probate statutes of the State of Oklahoma authorize the appointment of a non-resident administrator, that where several suits have been filed and dismissed and the purpose of having a foreign administrator appointed is to defeat the jurisdiction of a United States District Court and keep a case from being removed from the state to the federal court on the ground of diversity of citizenship, that the court would not permit this to be done, to avoid a removal'."

Respondents submit that neither of the two propositions decided and complained of by petitioner in this proceeding is in conflict with the holding of any other Circuit Court of Appeals or of the Supreme Court of the United States.

Inasmuch as the petition for a writ of *certiorari* raises two questions, respondents' answer brief is also divided into two parts, the first dealing with that holding of the Circuit Court of Appeals, which is condensed in the first paragraph of the syllabus of its opinion quoted above, and the second part having to do with the proposition decided by said court as summarized in the second paragraph of the syllabus of such opinion.

Petitioner states at the bottom of page six of his petition for a writ of *certiorari*, that a correct answer to the following question:

"In determining the jurisdiction of a United States District Court on the ground of diversity of

citizenship, whose citizenship and residence should govern where an administrator is a party to the suit—the administrator's residence and citizenship or the citizenship and residence of the beneficiaries or next of kin?",

will dispose of both propositions decided by the Circuit Court of Appeals in the case at bar. In saying in effect that "one question is involved," that quoted above, petitioner does not take into account *the differences in the kinds of action brought, nor the differences in the statutes under which the actions are brought, nor the element of wrongful deprivation of federal jurisdiction by collusion or fraud.*

Herein lies the fundamental difference between the positions of petitioner and respondents.

Respondents maintain that two questions are presented as follows: *First.* In an action brought under sections 824 and 825 of the Compiled Oklahoma Statutes of 1921, by an administrator for the use and benefit of the widow and children of his decedent, to recover damages for the death of such decedent, should the residence of the administrator or that of the widow and children govern in determining the jurisdiction of a United States District Court? And, *Second.* Were the acts here involved sufficient to show a collusive or fraudulent attempt to deprive the United States District Court of its rightful jurisdiction, and if so, what would be the effect of such acts? If either of these questions should be decided by this court in the same way as it was decided by the Circuit Court of Appeals, then the ultimate outcome of this case would be the same as if a writ of *certiorari* had never been sought.

Statement of Facts.

Before the submission and discussion of authorities, supporting the propositions above mentioned, respondents respectfully direct the attention of the court to the fact that the petitioner, in his statement of the case, omits to disclose that, prior to the institution of the present suit, three other actions for the same relief had been successively instituted by Lillian Smith, the widow of the decedent, who had been appointed as his administratrix by the County Court of Pawnee County, Oklahoma. As said widow and administratrix was a citizen of Oklahoma, and as the defendant Fitzsimmons Drilling Company was a resident of Louisiana, and the defendant Atlantic Oil Producing Company a resident of Delaware, each of these actions was removed to the proper federal court, and each, in turn, was dismissed by the plaintiff when she was unsuccessful in having it remanded. Two of these actions were removed to the United States District Court for the Western District of Oklahoma, and the other was removed to the United States Court for the Northern District of Oklahoma, since it, unlike the other two, was filed in a county within the jurisdiction of that court. (See record of proceedings on motion to remand at p. 43 of transcript of record.) It was after the dismissal of these suits that counsel for the widow conceived and executed the plan of having her resign as administratrix and having William H. Mecom, a resident of Louisiana, appointed in her place, and then bringing a fourth suit in the name of such foreign administrator in order that removal to the national court might be resisted on

the ground that said administrator and defendant Fitzsimmons Drilling Company were both residents of Louisiana. The facts relative to the suit brought within the jurisdiction of the United States Court for the Western District of Oklahoma, and the facts with respect to Mecom's appointment and his connection with this litigation, are thus stated in the opinion of the Circuit Court of Appeals:

"Shortly after the death of Smith his widow was appointed administratrix and she brought an action against the defendants in the state court alleging she and the two children as beneficiaries had been damaged in a very large amount. The defendants removed that case to the federal court and the plaintiff being unsuccessful on her motion to remand dismissed her action and shortly thereafter instituted another action like the first. This went through the same procedure as the first case. Thereafter, she resigned, as administratrix and one William H. Mecom, a citizen and resident of the State of Louisiana was appointed administrator by a probate court of Oklahoma. He then brought a like action in the state court. It was removed to the federal court. That court refused to remand it. The plaintiff dismissed and then he brought this action in the state court, in which, as in the prior cases, he embodied two counts. In the first count he alleged that he sues for the use and benefit of the widow and two minor children and asks damages in the sum of one hundred thousand dollars. In the second count he alleged deceased was conscious from the time he was injured until he died and on account of his injury suffered bodily pain and mental anguish from the time he was injured until he died, and prayed damages in the sum of three thousand dollars therefor. The case was removed to the federal court and on the court's refusal to remand it went to

trial and resulted in favor of defendants. Appellant comes here assigning error that the court overruled his motion to remand to the state court.

"The grounds for the removal of the case from the state to the federal court were, *first*, diversity of citizenship, and *second*, a fraudulent intent and purpose on the part of Mrs. Smith and her attorney and the present plaintiff to defeat federal jurisdiction. Adverting to the last point, it appears that the resignation of Mrs. Smith and the appointment of Mecom in her stead was solely the act of her counsel who brought the prior suits and this one. He wrote to Mecom asking him if he would accept such appointment. Mecom did not come to Oklahoma but signified his willingness to accept the appointment solely as an accommodation. When he was appointed the attorney for plaintiff signed the required oath and appointed Mrs. Smith as his resident agent. He did not sign the petition for his appointment as administrator nor the required bond. His name was signed to the petition and bond by counsel for the plaintiff in this case who had brought the prior suits for Mrs. Smith. He had nothing further to do with the estate of deceased and received no information about the estate. He gave no direction about the commencement of this or any other suit. He had no information about any litigation in which the estate might be interested and was in no way related to the deceased. So far as he could learn, the deceased left no estate in the State of Louisiana. He acted in the matter merely to accommodate Mrs. Smith's attorney."

These statements of the Circuit Court of Appeals are supported by the record of the evidence and proceedings had at the time of the hearing on petitioner's motion to remand this cause (R. 42-47); and are also reflected by re-

spondents' petition for removal (R. 9-23). The order overruling said motion to remand recites that it was heard on

> "the evidence offered, consisting of the proceedings in the matter of the estate of Archie Lee Smith, deceased, in the County Court of Pawnee County, State of Oklahoma, and the deposition of William H. Mecom and the affidavits attached to the response to the motion to remand and the verified transcript of the proceedings before Honorable Wyley Jones, Judge of the District Court in and for Oklahoma County, State of Oklahoma, and the agreement of the parties that the petition for removal contained a true and correct statement of the proceedings in the several prior actions to recover damages for the death of Archie Lee Smith, deceased * * *" (R. 33-34)

Division One.

The Holding of the Circuit Court of Appeals as Condensed in Its First Syllabus.

Petitioner contends that the Circuit Court of Appeals for the Sixth Circuit, in the case of *Cincinnati H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918, has decided the first question involved in this case oppositely to the decision in the present case. That was a suit brought by Thieband as administrator of Sweetman, against the defendant railroad company to recover damages arising from the death of deceased and occasioned by the negligence of the company. The right of the administrator to bring such an action was founded upon a statute of Indiana, where the accident and death occurred, which provided:

> "When the death of one is caused by the wrongful act or omission of another, the personal representative

of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. * * * The damages * * * must inure to the exclusive benefit of the widow and children, if any, or next of kin, and be distributed in the same manner as personal property of the deceased."

Thus, it will be observed that the Indiana statute unlike the Oklahoma statute (page 9, petitioner's brief), gave the right of action only to the administrator and did not provide that, under any circumstances, action might be maintained by the widow and children, if any, or next of kin. The court, in its opinion said:

"The statutes in the several states providing a remedy for the benefit of the family, or next of kin, of the deceased who dies from the wrongful act of another, differ in the mode by which it is accomplished and it is merely the effects of the subject we are considering. In some a remedy is given directly to the beneficiaries. Such is the law of Tennessee which was involved in the case of *Railway Company* v. *Hooper*, 92 Fed. 820, which came to this court from that state. There, either the administrator or the beneficiaries may sue. In others the right of action is devolved upon his personal representative. * * * The Indiana statute provides that the administrator may maintain an action if the deceased, had he lived, might have maintained an action for the same cause. The damages, when collected, are distributed to the family, or next of kin. *It is obvious that the beneficiaries cannot bring the action.* They have only the right to ultimately receive the proceeds when the administrator shall have executed his trust."

The case of *Atlanta K. & N. Ry. Co.* v. *Hooper*, 92 Fed. 820, decided by the Court of Appeals for the Sixth Circuit,

and distinguished in the case of *Cincinnati H. & D. R. Co.* v. *Thiebaud, supra,* relied on by petitioner, was an action brought by an administrator, under the statutes of Tennessee, for the wrongful death of his intestate. The pertinent sections of the Tennessee statutes are set out in the opinion. They provide that the right of action in a case of this sort shall pass to the widow of the decedent and in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin. Such statutes further provide that the action may be instituted by the personal representative of the deceased, but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit. Such statutes also provide that the action may be instituted by the widow in her own name, or if there be no widow, by the children. The Circuit Court of Appeals for the Sixth Circuit, in that case, said in its opinion:

> "It is settled by the decisions of the Supreme Court of Tennessee that no action can be maintained by an administrator of a deceased person under the foregoing sections unless there shall be in existence persons for whose benefit the right of action is given and that a declaration drawn under these sections which does not set forth the person for whose benefit the suit is brought, is fatally defective. *Railway Company* v. *Lilly*, 90 Tenn. 563, 18 S. W. 243; *Railroad Co.* v. *Pitt*, 91 Tenn. 86, 18 S. W. 118. *The next of kin for whose benefit the suit is brought are the real plaintiffs and the administrator though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party and a mere trustee.*" (Italics ours.)

The case of *Popp* v. *Cincinnati H. & D. Ry. Co.*, 96 Fed. 465, referred to by petitioner, is not a decision of an appellate court and for this reason probably should not be considered upon the petitioner's application for writ of *certiorari*. However, it does not appear that the statute of Ohio, which was involved in that case, provided that an action for wrongful death might be maintained under any circumstances by any one other than the administrator or personal representative of the deceased.

It is the contention of respondents that sections 824 and 825 of the Compiled Oklahoma Statutes for the year 1921, which are set out at page 9 of the brief in support of petition for writ of *certiorari*, are not the same as the "wrongful death" statute of the State of Indiana, under which the case of *Cincinnati H. & D. Ry. Co.* v. *Thiebaud* was decided, differing from such statute in that in Oklahoma an action for "wrongful death" may be brought also by the widow, or where there is no widow, by the next of kin of the deceased, where no personal representative is, or has been, appointed, or where the residence of the deceased at the time of his death was in any other state or territory. The Oklahoma statute, therefore, is, as far as the instant question is concerned, more nearly like that of Tennessee under which the case of *Atlanta K. & N. Ry. Co.* v. *Hooper, supra*, was decided, than it is like the Indiana statute involved in the case of *Cincinnati H. & G. Ry. Co.* v. *Thiebaud, supra*.

The only federal decision which passes on the question of whose citizenship governs in a case of "wrongful death" brought under the Oklahoma statute, whether that of the

administrator or that of the widow and children of deceased, in determining the jurisdiction of a United States District Court, is the case of *Carter* v. *St. Louis & S. F. Ry. Co.*, 29 Fed. (2d) 628, decided by the District Court for the Northern District of Oklahoma, on December 12, 1928, and holding that the widow and children of the decedent are the real parties in interest in an action brought by an administrator under the Oklahoma "wrongful death" statute, and that their citizenship and not that of the administrator controls on the question of diversity of citizenship. Neither the Circuit Court of Appeals of any district, nor the Supreme Court of the United States, had passed upon the Supreme Court of the United States, has passed upon this question under the Oklahoma statute. How, then, can there be a conflict among the opinions of the several Circuit Courts of Appeals when there has never been any decision rendered upon the subject by them?

Petitioner also cites two cases, each one brought by the administrator of a deceased person to recover damages for the death of the decedent caused by the negligence of the defendant, and in which the jurisdiction of the federal court was involved, such cases being:

Memphis Street Ry. Co. v. *Moore*, 243 U. S. 299, 61 L. ed. 733;

Patch v. *Wabash R. R. Co.*, 207 U. S. 277, 52 L. ed. 204.

In *Memphis Street Ry. Co.* v. *Moore, supra*, Moore, a citizen of Arkansas, had been appointed administrator by the Probate Court of Shelby County, Tennessee, and

brought suit in the United States District Court for the Western District of Tennessee against the Memphis Street Ry. Company, a citizen of Tennessee, on the ground of diversity of citizenship. The only question involved and presented to the court was the contention of the defendant that Moore, although a citizen of Arkansas, must be treated as a citizen of Tennessee, under the statutes of Tennessee, providing that:

> "Wherever a non-citizen of the State of Tennessee qualifies in this state as the executor or administrator of a person dying in, or leaving estate or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state."

The United States Supreme Court held that it was bound by a decision of the Supreme Court of Tennessee construing this statute and holding that its sole purpose was to extend to non-resident executors and administrators the privilege of suing in the state courts *in forma pauperis*, and that, therefore, the act did not take away from a non-resident administrator or executor the right to invoke the jurisdiction of the United States court in a suit against a resident of Tennessee. In this case it was assumed by the parties, and the court, that in the absence of such statute the courts of the United States would have jurisdiction and the opinion does not mention the residence and citizenship of the widow and children of the decedent, if any.

In *Patch* v. *Wabash Railroad Co., supra*, suit was filed in a state court of the State of Illinois. Defendant petitioned for removal, alleging that defendant was a citizen of Ohio and plaintiff was a citizen of Illinois. The case was

removed. In the federal court plaintiff filed a plea to the jurisdiction, alleging that defendant was a corporation organized and existing under the laws of Illinois, and several other states, and, therefore, a citizen and resident of Illinois and each of the other states where incorporated. Defendant demurred to such plea. The demurrer was sustained and as plaintiff elected to stand on the plea, judgment was rendered against plaintiff for costs. The United States Supreme Court held that the plea to the jurisdiction was good because defendant should have been regarded as a citizen of Illinois. In this case it was the citizenship of the defendant that was in question and not the citizenship of the plaintiff.

Consequently, neither the decision in *Memphis Street Ry. Co.* v. *Moore, supra,* or that in *Patch* v. *Wabash R. R. Co., supra,* is controlling, or persuasive, of the questions involved in the case at bar. In neither of these two cases was it determined whether under a "wrongful death" statute, such as that of Oklahoma, the residence of the widow, or children of decedent, or the residence of the administrator of the estate of decedent should govern in determining jurisdiction of the federal courts in an action authorized by such statute.

Petitioner cites, also, two cases, each of which was brought by the guardian of a minor to recover damages for injuries sustained by the minor, namely, *City of Detroit* v. *Blanchfield,* 13 Fed. (2nd) 13, and *Mexican Central Railway Co.* v. *Eckman,* 187 U. S. 429, 23 S. Ct. Rep. 211, 47 L. ed. 244. In the very nature of things, neither of these

cases could be applicable, because neither involves a statute similar to sections 824 and 825 of the Compiled Oklahoma Statutes of 1921, and neither of these cases is brought by an administrator. Each of them was brought by the guardian of a minor, who was entitled to have and hold possession of the entire assets of the ward. Neither of them sought to recover damages because of death by wrongful act. The first cited involved the laws of Michigan, and the second the laws of Mexico, in respect to the causes of action sought to be enforced.

In may be argued, with perhaps equally as much force, that the cases holding that it is the citizenship of the infant, and not that of his next friend, in a suit brought by a person, who is the next friend of an infant, which governs in determining diversity of citizenship for the purpose of ascertaining federal jurisdiction, are applicable here, as it is argued on behalf of petitioner that the guardianship cases such as *Mexican Central Ry. Co.* v. *Eckman, supra,* are applicable. The "next friend" cases are all alike. There does not seem to be the slightest doubt but that it is the residence of the infant and not that of the next friend which governs in this matter. The rule is recognized by text writers, cyclopedists and the courts. In support of this rule are the following cases:

Wiggins v. *Bethune,* 29 Fed. 51;

Voss v. *Neineher,* 68 Fed. 947;

Blumenthal v. *Craig,* 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

Section 211, Compiled Oklahoma Statutes of 1921, providing that:

> "An * * * administrator * * * may bring an action without joining with him the person for whose benefit it is prosecuted.";

cited by petitioner, is entirely procedural, and does not and could not affect the matter of the jurisdiction of the United States District Court.

The Supreme Court of the United States in the case of *Stewart* v. *Baltimore & Ohio Railroad Company*, 168 U. S. 445, 42 Law. ed. 537, in an action brought by the administrator of a deceased person to recover damages for the death of decedent, caused by the negligence of defendant, has recognized that in determining jurisdiction of the federal courts regard is had of the residence of the wife (the wife in this case being the only heir of decedent) rather than that of the administrator. The court, in the last mentioned case, in discussing the respective statutes of Maryland and the District of Columbia, the cause of action having risen in the State of Maryland and the action itself having been brought in the District of Columbia, said:

> "The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the de-

ceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

"For the purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 9 U. S., 5 Cranch. 303 (3:108); *M'Nutt* v. *Bland*, 43 U. S., 2 How. 9 (11:159); *State of Maryland, for Use of Markley*, v. *Baldwin*, 112 U. S. 490 (28:822). See, also, *Gaither* v. *Farmers & Mechanics Bank of Georgetown*, 26 U. S., 1 Pet. 37, 42 (7:43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorrak, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form; the *cestui que* use is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

In the case of *New York Evening Post* v. *Chaloner*, 265 Fed. 204, a committee (under the laws of the State of New York) was substituted as party plaintiff in lieu of the original party plaintiff, who had been adjudged insane and for whom the committee (standing in place of a guardian) had been appointed. It was there held that the residence of the representatives (the committee), who were vested with the exclusive right to enforce the claim and invest or use the

proceeds for the benefit of the ward, governed in determining jurisdiction of the federal court, rather than the residence of the ward. An administrator was not a party plaintiff. Neither was a death statute involved similar to the one in the case at bar. The case was one to recover damages for libel.

In the case of *New Orleans* v. *Whitney*, 138 U. S. 595, 11 Sup. Ct. Reporter 428, 34 Law. ed. 1102, while an administrator was a party plaintiff, the action was not brought under a "wrongful death" statute, but was for the purpose of recovering rents, revenues and profits from a certain quantity of land as assets of the estate involved, against the City of New Orleans as defendant. It could not, therefore, be in point.

In the case of *McNutt* v. *Bland*, 2 How. 9, 11 Law. ed. 159, it appears from the opinion that under the laws of Mississippi, sheriffs are required to give bond to the governor of the state for the faithful performance of their duty, and suit on the bond must be brought in the name of the governor of the state for the use of any person damaged by the acts or omissions of the sheriff. Suit was brought in the name of McNutt, Governor of Mississippi, for the use of citizens of New York, against Bland, the sheriff, and Benjamin G. Humphreys, his surety, both of whom were citizens of Mississippi. It was contended by the defendants that the federal court had no jurisdiction because the plaintiff, McNutt, as well as both defendants, were citizens of Mississippi. The United States Supreme Court, in an opinion by Mr. Justice BALDWIN, held that the federal court had jurisdiction on the ground of diversity of citizenship be-

tween the real parties in interest, holding that the governor was a mere naked trustee for any injured party, and saying:

"He is a mere conduit through whom the law affords a remedy to the person injured by the act or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the sheriff's bond.

"It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriff's bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. The Constitution extends the judicial power to controversies between citizens of different states; the 11th section of the Judiciary Act gives jurisdiction to the circuit courts, of suits between a citizen of the state where the suit is brought, and a citizen of another state. In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party; *both look to things—not names—to the actors in controversies and suits, not to the mere forms or inactive instruments.*

used in conducting them in virtue in some positive law." (Italics ours.)

In the case of *Maryland* v. *Baldwin*, 112 U. S. 490, 5 Supreme Court Reporter 278, 28 Law. ed. 822, the following facts were presented. Under the laws of Maryland, the bond of an administrator runs to the state and a suit on such a bond was brought in the name of the state for the benefit of non-residents and against resident defendants. The jurisdiction of the federal court was sustained on the ground that there was a diversity of citizenship between the party for whose benefit the suit was brought and the defendant. In the opinion by Mr. Justice FIELD, it is said:

"By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the Circuit Court of the United States has jurisdiction.

"A statute of Virginia in force in 1809 required bonds given by executors for the faithful execution of their duties to be made payable to the justices of the peace of the county where letters were issued, but allowed suits to be brought upon them at the instance of any party aggrieved; and in *Browne* v. *Strode*, 5 Cranch. 303, this court held that the Circuit Court of the United States for the district had jurisdiction of an action upon such a bond in the name of the justices of the peace for the use of a British subject, though the defendants were citizens of Virginia, the real controversy being between them and an alien.

"A statute of Mississippi in force in 1844 required sheriffs to execute bonds to the governor of the state for the faithful performance of their duties, which could be prosecuted by any party aggrieved, until the whole penalty was recovered. In *McNutt* v. *Bland*, 2 How. 10, an action was brought in the Circuit Court of the United States for the District of Mississippi in the name of the governor for the use of citizens of New York against defendants who were citizens of Mississippi, and on demurrer it was held that the Circuit Court had jurisdiction, the court observing that there was a controversy and a suit between citizens of New York and citizens of Mississippi, and there was neither between the governor and the defendants; that as an instrument of the state his name was on the bond and to the suit, but in no just view of the Constitution could he be considered as a litigant party. 'Both,' it added, *'look to things not names, to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law.' The justices of the peace in the one case and the governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case, the state is a mere nominal party; she could not prevent the institution of the action nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Mackley was alone named as plaintiff; and the action was properly removed to that court."* (Italics ours.)

It is apparent that throughout all of the above cases, whether relied on by petitioner or respondent, the principal question in determining whether the residence of the nom-

inal plaintiff, or the residences of the beneficiaries under the cause of action shall govern, lies in the determination of whether or not the nominal party plaintiff has and is entitled to the actual control of the lawsuit which has been brought, and exercises such control.

The record in this case shows conclusively that the nominal plaintiff Mecom not only was without control of this litigation and had nothing to do with the employment of attorneys, the commencement of any action, or the giving of any security for costs, but did not, in fact, until May 31, 1929, four months after this action was commenced, even know that the estate or administrator had any right of action, or that any suit had been brought in his name. His relationship to this case was and is purely nominal, and theoretical, and has resulted from the action of the widow of the deceased and former administratrix and her attorney, in filing the "resignation of administratrix and request for the appointment of William H. Mecom, as succeeding administrator," and on the same day (as a matter of statutory right) procuring the appointment of Mecom, and by then dismissing the pending suit commenced by Mrs. Smith as administratrix, and then filing a new suit in the name of Mecom as administrator without his knowledge or consent. Consequently, any control which the nominal plaintiff, Mecom, administrator, has in connection with the instant lawsuit is purely theoretical and arises by virtue of a legal relationship, and does not have its basis in fact.

If title, right to, or the possession or use of any recovery in the instant case is to be considered in determining whether or not Mecom, administrator, is purely a formal party, and in determining whether or not his residence

shall govern as to jurisdiction, then the question here presented would be determined adversely to petitioner because of the holding of the Oklahoma Supreme Court in *Aetna Casualty & Surety Company* v. *Young*, 107 Okl. 151, 231 Pac. 261, wherein the first subdivision of the syllabus by the court is as follows:

> "Moneys recovered by the administrator of the estate of a deceased under the provisions of section 824, Compiled Oklahoma Statutes 1921, do not belong to the estate of the deceased, and the County Court has no jurisdiction over the administrator in the maintenance of said suit or the settlement of such claims or the distribution of such moneys. Damages recovered under said section belong to the next of kin as therein provided and are in compensation for the losses sustained by such kin on account of the death of the deceased."

This same case is authority for the proposition that if damages are recovered in a suit under the Oklahoma "wrongful death" statute, when such suit is brought by a personal representative, such representative can do nothing with the funds received as damages except to pay them over to the beneficiaries or heirs, under the statute. See, also, *St. Louis and S. F. R. Co.* v. *Goode*, 42 Okl. 784, 142 Pac. 1185, cited in the opinion of the Circuit Court of Appeals (R. 55).

Under section 1141, Compiled Oklahoma Statutes of 1921, which is in part as follows:

> "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned and they are respectively entitled thereto, in the following order: *First*, the surviving husband or wife, or some competent person whom he or she may request to have appointed,"

the widow of decedent had the absolute right to be appointed administratrix of the estate of the deceased, or have some other person selected by her appointed as such, and the County Court of Pawnee County had no discretion in the matter. The County Court appointing a personal representative in Oklahoma, has no control of the personal representative or administrator in the commencement, prosecution or settlement of an action for wrongful death, or in the distribution of any damages recovered. Therefore, the widow in the present case, was in absolute control of the alleged cause of action at all times—as a matter of law as well as a matter of fact.

Division Two.

The Holding of the Circuit Court of Appeals as Condensed in the Second Syllabus.

First of all, as to point two of petitioner's brief, respondents' contention is that no federal appellate court has ever passed upon the question of whether facts similar to the ones involved in this case, will successfully deprive the federal courts of jurisdiction, and for this reason the petition for writ of *certiorari* should be denied.

It is settled that the fraudulent joinder, as plaintiff, or of a party whose citizenship is the same as the defendant, or as a defendant, of a party whose citizenship is the same as the plaintiff, will not be permitted to affect the jurisdiction of the courts of the United States on removal by the

real defendant whose citizenship is diverse from that of the real plaintiff.

—*Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. 35;

Wilson v. *Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. ed. 144, 42 Sup. Ct. 35;

New Orleans v. *Winter*, 1 Wheat. 91.

It is also established by the decisions that untrue allegations of fact made by plaintiff will not be permitted to deprive the courts of the United States of jurisdiction of an action against a defendant whose citizenship is diverse from that of the plaintiff.

—*Aldredge* v. *B. & O. R. Co.*, 20 Fed. (2d) 655 (C. C. A.);

Hunter v. *Illinois Cent. R. Co.*, 188 Fed. 645 (C. C. A.).

Where diversity of citizenship of adverse parties is brought about by collusion for the purpose of creating a case cognizable in federal court, such court will have no jurisdiction and the suit should be dismissed, and the rule is the same in all cases whether in contract or in tort.

—*Miller* v. *East Side Canal, etc., Co.*, 211 U. S. 293, 29 Sup. Ct. 111, 53 L. ed. 189;

Lake Co. v. *Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. ed. 684;

Lehigh Mining & Mfg. Co. v. *Kelly*, 160 U. S. 327, 16 Sup. Ct 307, 40 L. ed. 444.

Petitioner cites the case of *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 48 Sup. Ct. 404, 276 U. S. 518, 72 L. ed. 681. The court said in that case, [illegible]rring

to the succession of the Tennessee corporation to the property of its Kentucky grantor, that:

> "The succession and transfer were actual, not feigned or merely colorable. * * * In these circumstances the courts will not inquire into the motives when deciding concerning their jurisdiction. It is enough that respondent is the real party in interest."

Thus, the court decided that there was an actual transfer, but can that be said in the instant case? If so, it is only as a matter of theory.

In the case of *Southern Realty & Investment Co.* v. *Walker*, 211 U. S. 603, 29 Sup Ct. 211, 53 L. ed. 346, action was brought by a South Dakota corporation against a citizen of Georgia in a federal court sitting in the latter state. This action was dismissed as collusive, it being found that the South Dakota corporation was merely the agent of Georgia attorneys who brought it into existence as a corporation in order that individual citizens of Georgia having controversies with other individuals of that state, might in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the federal court. It must be admitted that these interested parties had the statutory right to organize the Southern Realty & Investment Company under the law of South Dakota and that such corporation had the right to take deeds or assignments to lands in Georgia or interest therein, and would ordinarily have had the right to prosecute in the federal courts a cause of action against citizens of Georgia to recover such lands or interests. However, when these lawful things were done with the bad or wrongful purpose of simply enabling citizens of Georgia to avoid the juris-

diction of the state courts and to invoke the jurisdiction of the federal courts, the doing of the lawful things were held to constitute a collusive or fraudulent plan, scheme or artifice. It is the circumstances surrounding agreements or transactions and the motive, intent or purpose, which determine whether they are collusive or fraudulent. This case, it seems to us, completely answers the question asked by petitioner on page 19 of his brief.

In the instant case there is no collusion to confer jurisdiction on the federal court but it is the contention of respondents that the antithesis of the proposition that diversity of citizenship brought about by collusion in order to create a case within the federal court's jurisdiction is not sufficient to cause the federal court to retain jurisdiction, is true. In other words, federal jurisdiction cannot any more be avoided by collusion than it can be invoked by collusion.

This court has expressed itself upon this very question in the case of *Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, at page 186 (51 L. ed. 430). It was there said:

> "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, *and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.*" (Italics ours.)

The case at bar presents a case of collusion between the widow of the deceased, who was the former administra-

trix of his estate, and her attorney and the plaintiff in this case, who was appointed administrator of the estate of decedent at the request of the widow and her attorney, upon the resignation of the widow as administratrix, solely to prevent the jurisdiction of the federal court.

The case at bar might be compared to that class of cases where it has been held that citizenship or domicile may not be changed by a party to a suit in order to give, or prevent, the jurisdiction of the federal court, unless the party in question makes such change of citizenship or residence in good faith and with the intention of residing in the new place of residence permanently or indefinitely. Where a person removes from one state to another for the sole purpose of enabling him to sue or be sued in the federal court, he does not thereby acquire a domicile or residence which will confer jurisdiction. This was held in the case of *Morris* v. *Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. ed. 690, and has been held in many other cases decided in the Supreme Court of the United States.

The case of *City of Detroit* v. *Blanchfield, supra*, cited by petitioner, contains some interesting passages on the question of collusion or fraud as affecting federal jurisdiction. In the course of the opinion, the court said:

> "Because of the constitutional limitations of the jurisdiction of federal courts, a different rule necessarily obtains in federal jurisdiction. Where the jurisdiction of a federal court is invoked upon the sole ground of diversity of citizenship, the action will be dismissed whenever it clearly appears that there is no such diversity of citizenship, or that the interest of a

nominal party to a suit is simulated and collusive, and created for the purpose of giving jurisdiction to a federal court. *Little* v. *Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; section 37, Judicial Code (Comp. St., Sec. 1019)."

The opinion in the same case in the very last paragraph says:

> "While, in a sufficiently clear case of collusion, it is the duty of the court to dismiss a case on its own motion, yet we think that *the rather casual admission by the guardian, near the close of the trial, that he supposes he was selected because he was an alien, does not make a clear enough case of fraud or collusion—if it be collusion at all—a question upon which we express no opinion, TO JUSTIFY DISPENSING WITH THE SAFER PRACTICE OF A SPECIAL ISSUE AND A TRIAL THEREOF.*" (Italics are ours.)

In the present case, it will be noted, there was a special issue upon the question of fraud and collusion, and a trial or hearing was had upon such issue. (See record, pages 42 to 47, and pages 9 to 23.) The practice suggested by the Circuit Court of Appeals for the Sixth Circuit in the *Blanchfield* case was followed in the instant case, thus properly raising the question of what the effect of such fraud and collusion should be.

It will be observed that none of the cases cited by petitioner, are cases wherein an administrator, or executor, was held to have been appointed fraudulently or collusively and apparently in none was the appointment of an administrator, or executor, attacked because it was fraudulent in so far as the jurisdiction of the federal court was concerned. Here again, although not an appellate decision,

is the case of *Carter* v. *Frisco*, decided by the United States District Court for the Northern District of Oklahoma, more nearly in point than any other of the cases cited—only in the case of *Carter* v. *Frisco*, the facts did not make out nearly so strong a case of collusion as is here presented.

Petitioner says that the petition for removal filed by defendants amounts to a collateral attack upon the judgment of the County Court in appointing the plaintiff Mecom as administrator of the estate of the deceased. Such is not the case, however. Respondents do not question the validity of the appointment of Mecom as administrator of the estate inasmuch as that is not involved on this hearing, nor has it been involved in the case in any of its stages. What respondents did contend, however, and what they now contend, is that any collusive appointment made as a result of an agreement between the widow of deceased, her attorney and the plaintiff Mecom, in order to defeat federal jurisdiction, will not be considered to affect, in any manner, the jurisdiction of the national courts. The appointment itself is not attacked. Respondents do assert and contend, however, that the appointment does not have any effect in changing the jurisdiction of the federal court, or in preventing the federal court from assuming jurisdiction to hear and determine the case at bar.

Attention is particularly directed to the case of *Cerri* v. *Akron-Peoples Telephone Co.*, 219 Fed. 285, because of the close similarity between the facts in that case and the one under consideration and because of the logic of the opinion therein. The opinion was written by Judge (afterwards Justice) CLARKE, and the case is thoroughly discussed in the

opinion of the Circuit Court of Appeals in the instant case. (See transcript, page 58.)

Respondents submit that it would be most difficult to find a case where a more flagrant device or artifice to prevent the jurisdiction of the United States Courts has been attempted, than was attempted in the case at bar.

Summary of Argument.

For the foregoing reasons, therefore, respondents contend the decision of the Circuit Court of Appeals in the instant case is not in conflict with the decisions of any other Circuit Court of Appeals, or the decisions of this court.

Conclusion.

It is, therefore, respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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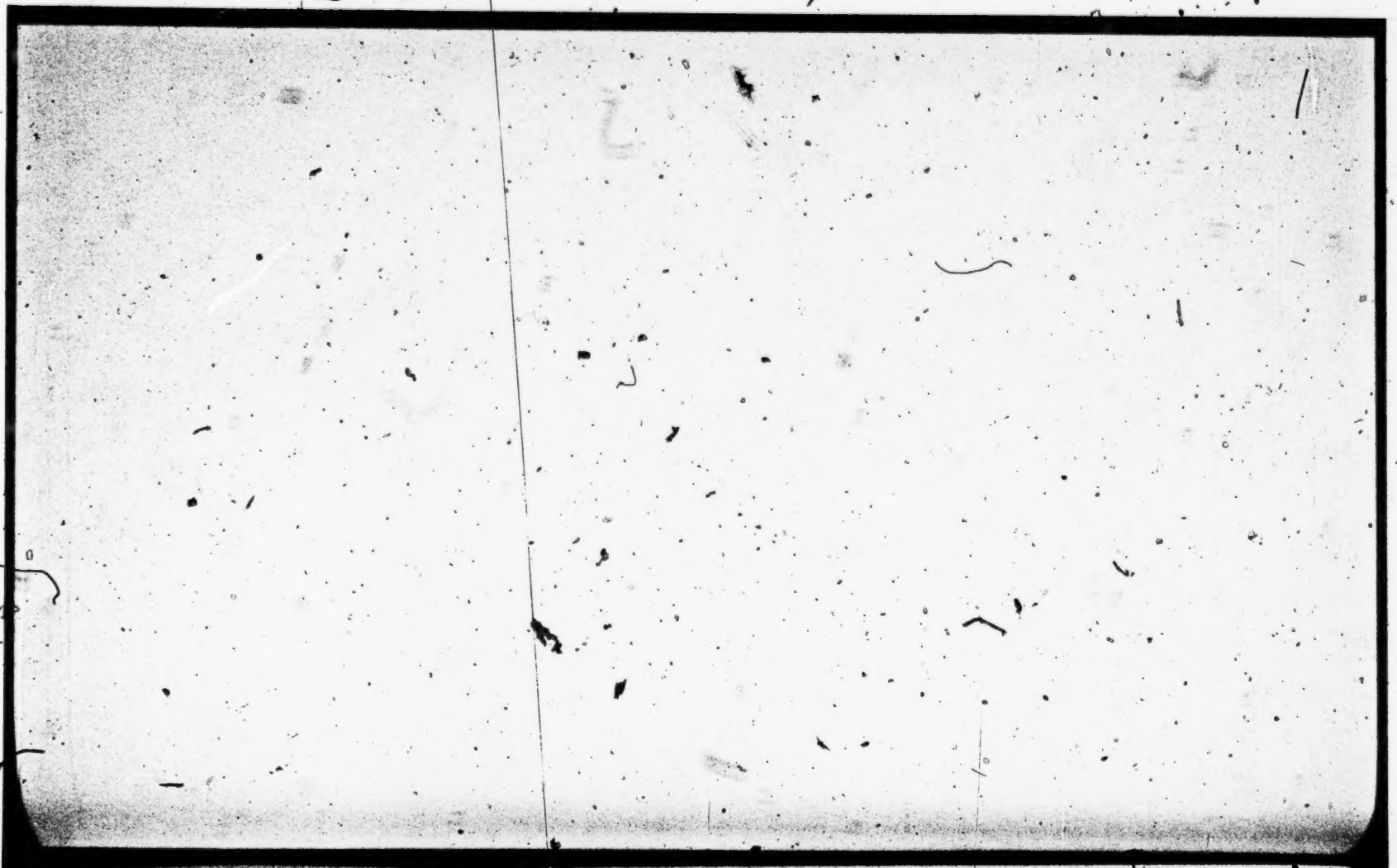

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 790

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENTS.

For their brief in this case on the writ of *certiorari* respondents adopt and incorporate herein all of the argument and matter set forth in their brief previously filed in this cause in opposition to the petition for writ of *certiorari*, and furnish the following as a supplement or addition to their prior brief.

Statement of the Case.

The statement of the case, given by petitioner at pages 2-7 of his brief on *certiorari*, is substantially correct. Pe-

titioner does not, however, give any of the particulars regarding the *four* suits filed prior to this one, which four suits were based on the same cause of action as the first cause of action in the instant case and which had been removed to the federal courts and there dismissed by the plaintiff. Therefore, specific attention is respectfully directed to the statement of facts contained at pages 4-7 of the brief of respondents in opposition to the petition for writ of *certiorari* in this case, and the following supplementary statement of facts, which shows the chronological order of events in this respect.

Chronological Statement.

On August 1, 1927, Mrs. A. L. Smith (Lillian Smith) was regularly appointed as administratrix of the estate of Archie Lee Smith, deceased, by the County Court of Pawnee County, Oklahoma, and letters of administration were duly issued to her pursuant thereto.

On October 27, 1927, an action was commenced by said administratrix in the District Court of Oklahoma County, Oklahoma, against the respondents and certain individual defendants employed by one or other of respondents, based upon the same cause of action as the first cause of action in the instant case, seeking to recover $100,000.00 as damages (R. 13; also 42). After regular procedure, on November 28, 1927, this first case was ordered removed to the United States District Court for the Western District of Oklahoma. Subsequently, motion to remand to the state court was filed by said administratrix, which motion to remand was over-

ruled on June 6, 1928 (R. 14, also 42). Thereafter, on July 6, 1928, said administratrix filed a dismissal of said cause (R. 15, also 43).

On or about July 8, 1928, a second action was commenced by the same plaintiff against respondents and certain employees of one or other of respondents, upon the same cause of action, in the District Court of Oklahoma County, Oklahoma, being case number 56098, asking a recovery of the same amount as the first case. *(Id.)*

On July 9, 1928, a third action was commenced by the same plaintiff against respondents and certain employees of one or other of respondents, on the same cause of action, asking a recovery of the same amount, having been brought in the District Court of Tulsa County, Oklahoma, as case number 43033 (R. 16, also 42).

Pursuant to due procedure, an order of removal was granted in the second action, being case number 56098 in the District Court of Oklahoma County, Oklahoma, and this case also was removed to the United States District Court for the Western District of Oklahoma (R. 15, also 42).

After regular procedure, on August 9, 1928, an order of removal was granted in the third action, being case number 43033 in the District Court of Tulsa County, Oklahoma, and this case was removed to the United States Court for the Northern District of Oklahoma (R. 16-17, also 42).

A motion to remand was filed in the second action which had been case number 56098 when it was in the District Court of Oklahoma County, Oklahoma; but the United

States Court for the Western District of Oklahoma, overruled such motion on November 15, 1928, and thereafter, on December 6, 1928, the administratrix as plaintiff therein dismissed said case (R. 15-16, also 42).

On December 10, 1928, Mrs. A. L. Smith resigned as administratrix of the estate of Archie Lee Smith, deceased, and filed in the administration proceedings upon the estate of said Archie Lee Smith, deceased, in the County Court of Pawnee County, Oklahoma, her request for the appointment of William H. Mecom, the petitioner here, as administrator of said estate. Said William H. Mecom was a resident of Louisiana, of which state defendant Fitzsimmons Drilling Company was a resident; and the *motive* behind his appointment was a destruction of the diverse citizenship theretofore existing between the parties to this controversy (R. 43). On the same day, on which Mrs. Smith resigned, a petition for the appointment of petitioner as administrator of said estate was filed and signed "William H. Mecom by Roy F. Ford," said Roy F. Ford being attorney for Mrs. A. L. Smith in the three suits brought by her as above related, and on said day an order was made by the County Court of Pawnee County, Oklahoma, appointing petitioner as such administrator (R. 17-18; also 42-44; also 53-64). The petition for letters of administration recited that petitioner here, William H. Mecom, was a friend of the family of A. L. Smith, deceased, which was not the fact. *(Id.)*

In the third action brought by the administratrix as plaintiff, which had been number 43033 when in the District Court of Tulsa County, Oklahoma, a motion to remand had

been filed after the case had been removed to the national court, and on December 13, 1928, such motion was overruled by the United States Court for the Northern District of Oklahoma, and a dismissal of said cause was filed by said plaintiff on the same day (R. 16-17, also 42).

In December, 1928, probably about December 26th, the petitioner Mecom received some papers from the law firm of Ford & Montgomery of which the said Roy F. Ford was one of the members, which petitioner signed and returned, he having consented to act as administrator of the estate of A. L. Smith, deceased, as an accommodation to such law firm. These papers consisted of an oath of administrator, power of attorney in favor of Mrs. A. L. Smith (according to the judgment of petitioner as set forth in his deposition) and apparently of an appointment of Mrs. A. L. Smith as the resident agent of petitioner in Oklahoma. This appointment of resident agent, which was dated December 26, 1928, and oath of administrator, were filed in the County Court of Pawnee County, Oklahoma, on January 3, 1929. Prior thereto, on December 12, 1928, the bond of petitioner as administrator of the estate of said A. L. Smith, had been filed and approved, the name of petitioner being signed thereto by Roy F. Ford as his attorney (R. 43). After a motion to remand this action had been filed, respondents filed a response thereto and a hearing was had on the special issue of fraud and collusion raised thereby (R. 26-30, also 32-33). Respondents, prior to the hearing on said issue, took petitioner's deposition and he testified that he was not related to or acquainted with either A. L. Smith, deceased, nor any

of his next of kin or heirs; that after executing the papers above mentioned, on or about December 26, 1928, he had nothing further to do with the estate of A. L. Smith, deceased, and received absolutely no information about such estate, and that he had no knowledge of any claim or litigation in which the estate of A. L. Smith was interested; and also that he at no time gave any direction with reference to the commencement of any action in his name (R. 43-44; also opinion of Circuit Court of Appeals, R. 53).

On January 5, 1929, an action against respondents was commenced in the name of petitioner as plaintiff, in the District Court of Oklahoma County, Oklahoma, on the same cause of action as the first cause of action in the case which is now before this court, seeking to recover the sum of $100,000.00 and being case number 57527 (R. 20, also 42).

On January 26, 1929, *a fifth action* against respondents was commenced in the name of petitioner as plaintiff, in the District Court of Oklahoma County, Oklahoma. This action, with its subsequent developments, is the one now before this court. Originally, it was an action for $3,000.00, and was based on the same cause of action that is now the second cause of action herein and sought a recovery for pain and suffering of decedent after his injury and before his death. This case was number 57713 in the state District Court (R. 21, also 42).

In case number 57527 in the District Court of Oklahoma County, Oklahoma, the fourth action, after proper proceedings were had, an order of removal was made on February 4, 1929, and the case was removed to the District

Court of the United States for the Western District of Oklahoma. After the removal of this case, a motion to remand was filed, and the same was overruled by the court on May 8, 1929, and the plaintiff was required by the court to make a cost deposit or cost bond. The plaintiff by his attorneys, having refused in open court to make such a cost deposit or cost bond, such case was ordered dismissed by the court. (R. 20-21, also 42).

Thereafter, on May 15, 1929, an amended petition in case number 57713 in the District Court of Oklahoma County, Oklahoma, was filed, same containing the two causes of action which are stated by petitioner in his brief. After the filing of this amended petition, which sought a total recovery of $103,000.00, the cause was removed to the United States District Court for the Western District of Oklahoma, and further proceedings were had as related by petitioner in his brief, and as related by respondents in their brief in opposition to the petition for writ of *certiorari* (R. 21-47).

With respect to the four cases filed and dismissed by counsel representing Mrs. Smith, it should be noted that in each instance an unsuccessful attempt was made to prevent removal by fraudulently joining resident defendants. (See petition for removal, pages 13-17, and stipulation at page 42, with respect to said actions, and order overruling motion to remand at page 32.) We mention this for the purpose of showing how determined counsel were to defeat federal jurisdiction. It should further be noted that, on petitioner's motion to remand this action, a special issue of fraud and collusion was framed and that the trial court found such issue in favor of these respondents (R. 26-30, also 32-33).

Before going into the argument of the case, it is deemed perhaps advisable to point out one thing: Petitioner observes at page 4 of his brief in the statement of facts, that "some four other lawsuits had been filed by the widow as administratrix, seeking to recover on the first cause of action set out in petitioner's amended petition, which actions had all been removed to the federal court and dismissed by plaintiff therein prior to the institution of the present suit, *but it was agreed that none of the four cases had contained a cause of action the same or similar to the second cause of action set out in petitioner's petition.*" This second cause of action was for damages in the sum of $3,000.00, and if it had been the only cause of action the case would not have been removable on account of the amount involved. The statement quoted above is not precisely correct, since only three actions had been filed by the widow as administratrix seeking to recover on the first cause of action set out in petitioner's amended petition, the fourth action previous to this one seeking a recovery on the same cause of action having been brought in the name of petitioner as administrator. It might be fairly presumed that petitioner does not seek to show that joining a non-removable cause of action with a removable one, has the effect of making the case non-removable, inasmuch as he does not refer to the matter in his argument and does not cite any authorities in connection with the matter. But since petitioner has mentioned the situation, respondents submit that the combination of the second cause of action with the first cause of action is ineffective to prevent removal. *McLaughlin* v. *Western Union Telegraph Co.*, 7 Fed. (2d) 177.

The Circuit Court of Appeals, in its opinion herein, said on the phase of the litigation:

"Coming now to the second cause of action removed and pleaded in the petition, it may be said that cause of action could neither have been brought in the federal court nor, standing alone, have been removed thereto for want of jurisdiction over the subject-matter in a federal court, for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the cause of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 112; *Barney* v. *Latham*, 103 U. S. 205, 26 L. ed. 514; *Brooks* v. *Clark*, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; *Connell* v. *Smiley*, 156 U. S. 335, 15 S. Ct. 353, 39 L. ed. 443; *Venner* v. *Southern Pac. Co.*, (C. C. A.) 279 F. 832; *Rogers* v. *Penobscot Mining Co.*, (C. C. A.) 154 F. 606; *Cella, Adler & Tilles* v. *Brown*, (C. C.) 136 F. 439; *Hamilton* v. *Empire Gas & Fuel Co., et al., and Shriver* v. *Empire Gas & Fuel Co.*, (C. C. A.) 297 F. 422; *Hoffman* v. *Lynch*, (D. C.) 23 F. (2d) 518; *Bedell* v. *Baltimore & O. R. Co.*, (D. C.) 245 F. 788; *Strother* v. *Union Pac. R. Co.*, (D. C.) 220 F. 731; *Flas* v. *Illinois Central R. Co.*, (D. C.) 229 F. 319, and many other cases."

See opinion as reported in 47 Fed. (2d) 28.

ARGUMENT.

On the strength of the undisputed facts in this case, as above outlined, respondents submit the following propositions:

First. Even in the absence of collusion, in an action brought under sections 824 and 825, Compiled Oklahoma Statutes of 1921, as amended, Session Laws 1925, the citizenship of the beneficiaries under such statutes and not that of the personal representative of the deceased, governs in determining the jurisdiction of the United States courts on the ground of diversity of citizenship.

Second. As the facts in this case are sufficient to show that identity of citizenship of adverse parties has been brought about by acts of collusion or artifice or conspiracy for the express purpose of defeating the jurisdiction of United States court in a case otherwise cognizable in such court, such acts will not be permitted to deprive the federal court of jurisdiction, or to in any way affect the jurisdiction of such court.

First Proposition.

Even in the absence of collusion, in an action brought under sections 824 and 825, Compiled Oklahoma Statutes of 1921, as amended, the citizenship of the beneficiaries under such statutes and not that of the personal representative of the deceased, governs in determining the jurisdiction of the United States courts on the ground of diversity of citizenship.

While it is ordinarily true that in an action brought by

an administrator, an executor, a guardian or a trustee, or other representative or fiduciary, it is the citizenship of such representative or fiduciary that will be considered in determining whether or not, for the purpose of federal jurisdiction, diverse citizenship exists, this rule is not universally true. When an administrator, trustee or other person brings an action and is what this court has termed a "mere conduit" for the transference to the beneficiaries of the monies sought to be recovered, then the citizenship of such beneficiaries governs. In none of the cases in this court relied upon and cited by petitioner was the plaintiff, as here, a "mere conduit" for the transference of funds and hence we do not consider them in point and for that reason do not discuss them in detail.

The wrongful death statutes of Oklahoma (sections 824 and 825, C. O. S. 1921, as amended by chapter 125, Session Laws 1925) provide that the damages recovered thereunder "must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin to be distributed in the same manner as personal property." If no administrator is appointed, the suit must be maintained by the surviving spouse, if any, or by the next of kin, if no spouse survives. If an administrator is appointed, the action for the alleged wrongful death must be brought in his name but if damages for the death are awarded and collected they, unlike the damages for pain and suffering, if there has been any, do not become assets of the decedent's estate but must be paid over by him, forthwith, to the beneficiaries designated by the statute. See *Aetna Casualty and Surety Company* v. *Young*, 107 Okl. 151, 231; *St. Louis and*

S. F. R. Co. v. *Goode*, 42 Okl. 784, 142 Pac. 1185, discussed at page 22 of respondents' brief herein in opposition to the petition for a writ of *certiorari*. See, also, the Circuit Court of Appeals opinion herein and *Smith* v. *Chicago, R. I. & P. Ry. Co.*, 42 Okl. 577, 142 Pac. 398. By inadvertence, the opinion of the Circuit Court of Appeals, both as it appears in the record and as reported in 47 Fed. (2nd) 28, cites the *Goode* case as holding that the damages recovered under the Oklahoma wrongful death statute "become assets of the decedent's estate." It is evident that by clerical error the word "not" has been erroneously omitted since the *Goode* case holds that such damages do *not* become assets of the decedent's estate.

Under these circumstances, the citizenship of the beneficiaries governs and the administrator, if there is one and suit is brought in his name, is a nominal party and this is true even though the suit must be brought in the name of the administrator, if one is appointed, and even though the administrator, when he brings the action, is "master of the litigation."

The opinion for the Circuit Court of Appeals in the case of *Atlanta, K. and N. Ry. Co.* v. *Hooper*, 92 Fed. 820, was written by Judge TAFT. There was involved in that case an action for wrongful death brought by administrator under the statutes of Tennessee. Such statutes provided that the action should be brought for the benefit of the widow or next of kin. Construing these statutes, it was said:

"The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator

though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. (Italics ours.)

The Tennessee wrongful death statutes construed in the *Hooper* case more nearly approach the Oklahoma statutes on the same subject than do those of Indiana passed upon in the case of *Cincinnati, H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918 (C. C. A., 6th Circuit), so strongly relied upon by petitioner and which, in our judgment, conflicts with the decision of this court in *Stewart* v. *Baltimore and O. R. Co.*, discussed *infra*.

When, however, the statute, as in Indiana, prescribes that the suit can be brought only by the administrator or where, as in Maryland, it provides that it can only be brought in the name of the state, nevertheless such plaintiff is merely nominal. In the case of *Stewart* v. *Baltimore and O. R. Co.*, 168 U. S. 445, an administrator sued in the District of Columbia for a wrongful death, occurring in Maryland. Under the District of Columbia wrongful death statute, the action had to be brought in the name of an administrator. Under the Maryland wrongful death statute, it had to be brought in the name of the State of Maryland. In either case, however, it was brought for the benefit of the persons pointed out by the particular statute. Under these circumstances, this court said:

> "The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in the district the personal representatives of the deceased. But neither the state in the one

case nor the personal representative in the other has any pecuniary interest in the recovery. *Each is simply a nominal plaintiff.* While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

"For purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 9 U. S. 5 Cranch 303 (3:108); *McNutt* v. *Bland*, 43 U. S. 2 How. 9 (11:159); *State of Maryland, For Use of Markley*, v. *Baldwin*, 112 U. S. 490 (28:822)." (Italics ours.)

In *McNutt* v. *Bland*, 2 How. 9, there was under consideration a statute of Mississippi, requiring an action on the sheriff's bond to be brought in the name of the governor of the state. It was held that the citizenship of the party injured governed and not the citizenship of the nominal plaintiff, who was characterized as "a mere conduit through whom the law affords a remedy to the person injured by the act or omissions of the sheriff." See, also, *Browne* v. *Strode*, 5 Cranch 303, and *Huf* v. *Hutchinson*, 14 How. 586, to the same effect.

In *Maryland* v. *Baldwin*, 112 U. S. 490, there was involved a statute of Maryland, requiring suit on an administrator's bond to be brought in the name of the state. It was held that the state was a nominal party and that the

citizenship of the persons interested in the estate, and for whose benefit the bond was given, governed.

In *Carter* v. *St. Louis and San Francisco*, 29 Fed. (2d) 628, the United States District Court for the Northern District of Oklahoma held that in an action for wrongful death, under the Oklahoma statute, the citizenship of the beneficiaries governed.

On the strength of the foregoing authorities, we submit that in an action brought for damages under the Oklahoma wrongful death statute, the citizenship of the beneficiaries and not that of the administrator governs, in determining federal jurisdiction on the ground of diversity of citizenship.

Proposition Two.

As the facts in this case are sufficient to show that identity of citizenship of adverse parties has been brought about by acts of collusion or artifice or conspiracy for the express purpose of defeating the jurisdiction of United States court in a case otherwise cognizable in such court, such acts will not be permitted to deprive the federal court of jurisdiction, or to in any way affect the jurisdiction of such court.

We think that the fundamental error of counsel for petitioner is in assuming that because each of the several acts performed by them in an endeavor to circumvent federal jurisdiction was authorized by statute, the combination of them for the express purpose of defeating a removal to the federal court cannot be the ground for holding that such acts amount to a fraudulent device that will not be allowed

to prevent a lawful removal of this cause. This court, of course, has held that where one is allowed, under the law of the particular state, to join a resident employee in an action for damages against a foreign corporation, and where there is a real intention to obtain a joint judgment, the fact that the joinder is made to prevent a removal to the federal court will be deemed immaterial. *Chicago, R. I. and P. R. Co.* v. *Schwyhart*, 227 U. S. 184; *Chicago, B. and O. R. Co.* v. *Willard*, 220 U. S. 413.

But here we have considerably more than the bare exercise of a legal right. We have what amounts to a conspiracy to defeat federal jurisdiction. In none of the cases in this court, where the motive behind a joinder was held immaterial, was the case first rightfully removed to the federal court, as here, and the cause then dismissed and a new action brought with a new defendant imported in order to prevent removal. Regardless of that, however, it is well recognized that lawful acts may be the links of a conspiracy. *Aikins* v. *Wisconsin*, 195 U. S. 194, 206; *Western Union Telegraph Co.* v. *International Brotherhood*, 2 Fed. (2d) 293.

We have such a situation here. Counsel had the legal right to dismiss the prior actions, which had been rightfully removed to the federal court. Mrs. Smith had the legal right to resign as administratrix of the estate of her deceased husband. She and counsel had the legal right to suggest to the County Court of Pawnee County, Oklahoma, that the petitioner, William H. Mecom, a resident of Louisiana, of which state one of the respondent corporations was a citizen, be appointed as administrator of said estate in

succession to Mrs. Smith. But counsel, Mrs. Smith and Mr. Mecom had no right to do and combine these acts for the express purpose of hindering the respondents *from exercising their right* to have this cause determined in the national courts. *If the federal courts are powerless to render unsuccessful a conspiracy to defeat their jurisdiction, they are impotent indeed.*

It is not true, as counsel contend, that the motive of the actor or actors is immaterial, if the act itself be one which the law permits. A bad or sinister motive can frequently make wrong an otherwise lawful act.

In *Aikins* v. *Wisconsin*, 195 U. S. 194, 206, it was said:

> "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 253, this court observed:

> "The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others."

In *Western Union Telegraph Company* v. *International Brotherhood*, 2 Fed. (2d) 993 [affirmed 6 Fed. (2d) 444], it

was held that while an individual had the right to cease work, a number of individuals had no right to combine to quit work for the purpose of obstructing interstate commerce. See, also, *Gompers* v. *Buck Stove and Range Company*, 221 U. S. 418, 439.

The subject is well discussed in the following excerpt from *Plant* v. *Woods*, 176 Mass. 492, 57 N. E. 1011, 1014:

> "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen* v. *Flood* as reported in (1898) App. Cas. 1, as follows: 'An act lawful in itself is not converted, by a bad or malicious motive, into an unlawful act, so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate. In so far as a right is lawful it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor—as, where one digs upon his own land for water (*Greenleaf* v. *Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra* v. *Bourges*, 141 Mass. 7, 4 N. E. 623); but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this

justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel, and of procuring a wife to leave her husband. *Tasker* v. *Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See, on this, an instructive article in 8 Harv. Law Rev. 1, where the subject is considered at some length. It is manifest that not much progress is made by such general statements as those quoted above from *Allen* v. *Flood*, whatever may be their meaning."

Applying this reasoning, the right given by law to sue joint tort feasors jointly, might well be esteemed so absolute as to be enjoyed regardless of the motive behind the joinder. On the other hand, we deny that counsel, Mrs. Smith and Mr. Mecom, acting in concert and after federal jurisdiction had four times attached to this controversy, possessed the absolute right to plan and execute a series of acts, each in itself lawful under most circumstances, *for the express purpose of depriving respondents of the right of trying this controversy in the federal courts.*

Even if a statute, one of whose effects would be the depriving foreign corporations of the right to remove controversies to the federal courts, might not be upheld if adopted with that "sinister end" in view. *Railway Express Agency* v. *Virginia*, decided February 2, 1931. Surely, if a legislature is so restricted, individuals cannot claim that acts of

theirs performed to prevent federal jurisdiction are beyond scrutiny.

The Circuit Court of Appeals, in its opinion in this cause, discussed at some length the case of *Cerri* v. *Akron People's Telephone Company*, 219 Fed. 285, decided by Judge (afterwards Justice) CLARK. We think, as remarked by the Circuit Court of Appeals, that that case while "not like the present one in point of fact" is "by parity of reasoning * * * alike in principle with the instant case."

The federal courts have always zealously guarded against the collusive conferring of jurisdiction on the federal courts, and this was true even before the passage of the Act of March 3, 1875. *Lehigh Mining and Mfg. Co.* v. *Kelly*, 160 U. S. 327; *Miller* v. *East Side Canal Co.*, 211 U. S. 293; *Lake Company* v. *Dudley*, 173 U. S. 243; *City of Detroit* v. *Blanchfield*, 13 Fed. (2d) 13 (C. C. A.). *They should be equally zealous to protect defendants against being deprived by collusion, fraud or conspiracy of their right of removal to the federal courts.*

In fact, the whole matter is well summarized in the following quotation from *Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, at page 186:

> "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

Collateral Attack.

It is seriously contended by counsel that the decision of the lower courts that the appointment of petitioner as administrator would not, under the circumstances of this case, be allowed to defeat federal jurisdiction, constitutes a collateral attack on the order of the County Court of Pawnee County, appointing the petitioner as Mrs. Smith's successor. This conclusion of counsel misconceives the position of respondents. They do not contend that petitioner's appointment is invalid, neither do they assert that for the purpose of administering decedent's estate such appointment is inoperative. Respondents' contention, in this connection, is simply that the collusive combination of counsel, Mrs. Smith and Mr. Mecom whereby, for the express purpose of defeating federal jurisdiction, a resident of Louisiana was substituted for a resident of Oklahoma as the personal representative of the decedent, should not and need not be sanctioned by the federal courts in determining whether or not they possess jurisdiction in this case.

Counsel's assertion that the responsibility for the situation created by petitioner's appointment rests entirely on the County Court of Pawnee County, and that, therefore, the national courts are powerless to redress the wrong that otherwise would be inflicted on respondents, is without merit. Except for Mrs. Smith's resignation and her nomination of petitioner as her successor and except for counsel conceiving and advising such steps for the purpose of defeating federal jurisdiction, such a situation could never have been created. We are not complaining of the County

Court of Pawnee County. We are complaining of collusion and conspiracy on the part of Mrs. Smith, counsel and petitioner.

Conclusion.

On the strength of the undisputed facts in this case and the foregoing principles and authorities, respondents believe that the decision herein of the Circuit Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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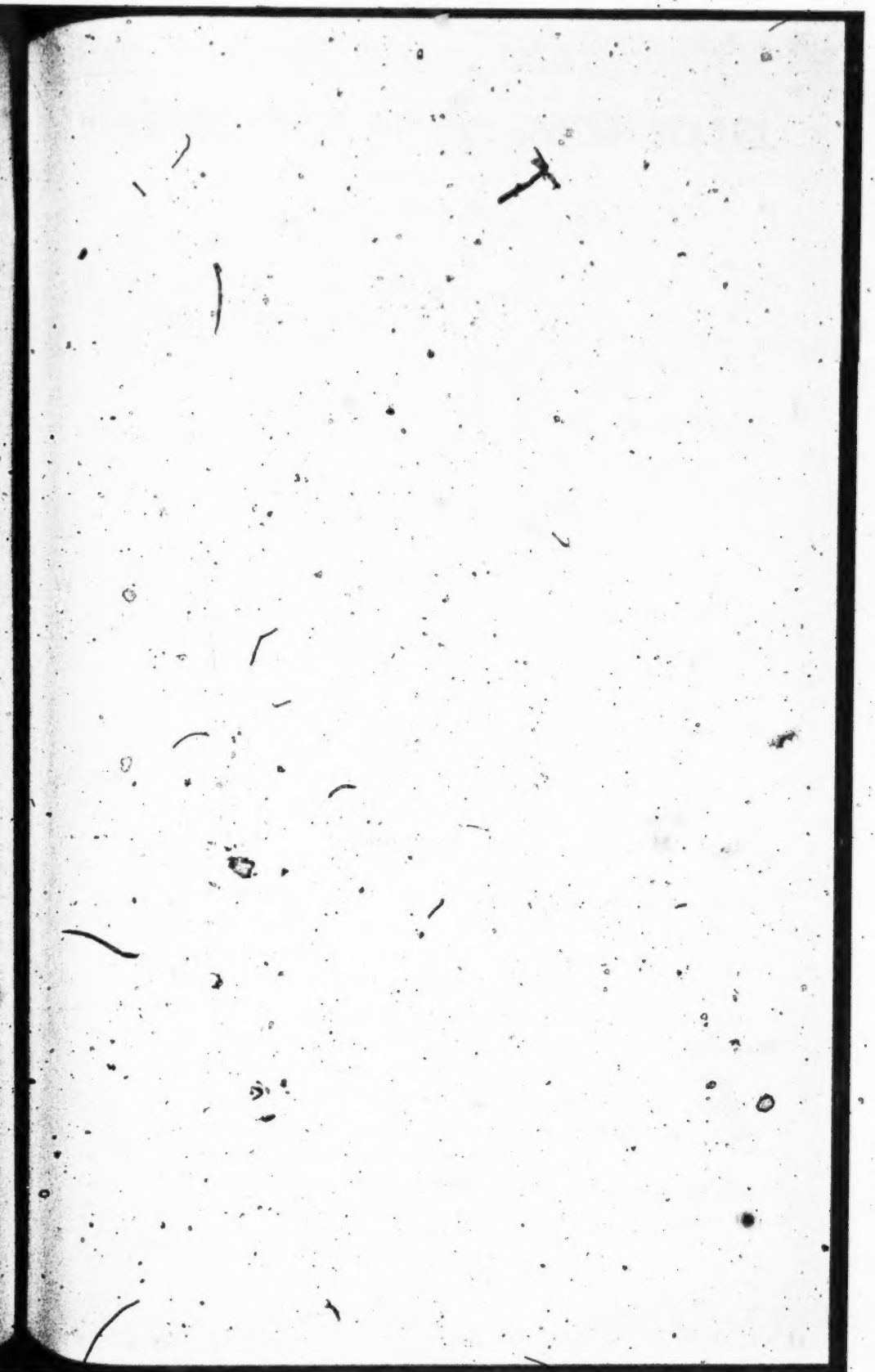

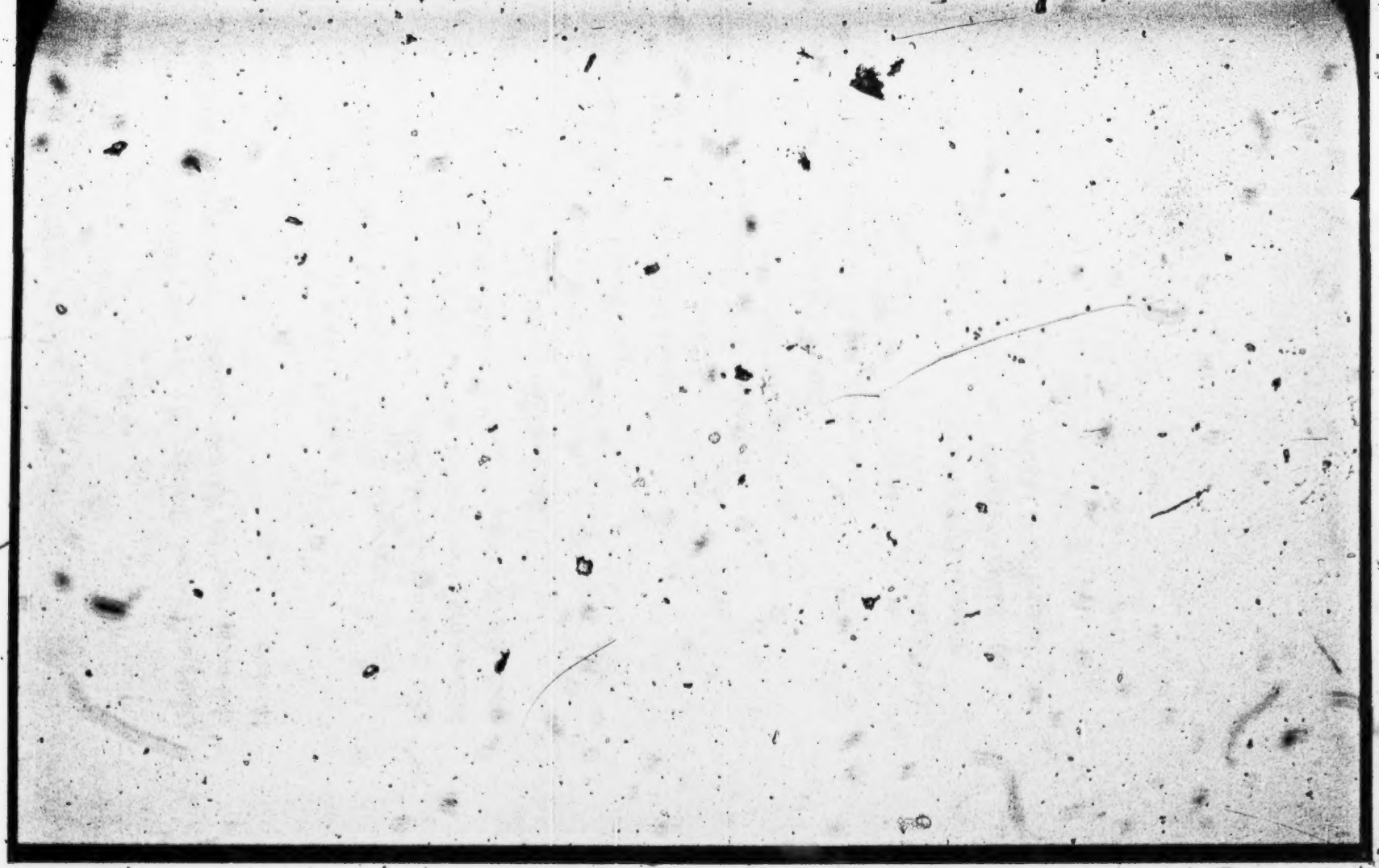

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1931.

William H. Mecom, Administrator of the Estate of Archie Lee Smith, deceased, Petitioner,
vs.
Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 23, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

Smith, a citizen and resident of Oklahoma, died as a result of injuries alleged to have been negligently inflicted by the respondents. His widow was appointed administratrix of his estate by an Oklahoma probate court, and, as such, instituted an action for damages in a district court of that state, against the respondents and certain individuals, under a statute creating a cause of action for death by wrongful act. Such a proceeding is required to be brought by the administrator, if there be one. The amount recovered does not constitute assets of the estate, but is to be divided between the widow and children.

The cause was removed to the United States District Court. The administratrix filed a motion to remand, which was overruled. She then dismissed the action. Subsequently she brought a second suit as administratrix, against the respondents and certain of their employees, upon the same cause of action, in a district court of Oklahoma; and a little later brought a third against the same or some of the same defendants in another state district court. Both were removed into the appropriate United States District Courts. Motions to remand were overruled, and both were thereupon dismissed by the plaintiff.

The widow resigned as administratrix and upon her request the probate court appointed petitioner as administrator. He was and

[1] §§ 822-825, Comp. Stat. Okla. 1921.

is a resident and citizen of Louisiana, of which state the respondent Fitzsimmons Drilling Company is also a citizen. He filed the present action in a state court, and the respondents again removed to the United States District Court. The petitioner having moved to remand the respondents answered charging fraud and collusion on the part of the widow, her attorney, and the petitioner, the alleged object of which was to prevent removal by having an administrator appointed whose citizenship was the same as that of one of the defendants. A hearing was had at which it was proved that the motive for the appointment was to obviate the diverse citizenship of the parties which had justified the removal of the earlier suits, and that petitioner had, as a favor to the widow and her attorney, agreed to act as administrator. The District Court refused to remand. To this refusal the petitioner saved proper exceptions.

It should perhaps be remarked that in this last suit there was included a second cause of action for pain and suffering caused the deceased between the date of his injury and that of his death; but no question here arises in respect of this cause of action, and for present purposes it may be disregarded.

At the trial on the merits a demurrer to petitioner's evidence was sustained, and judgment for respondents resulted. On appeal the Circuit Court affirmed, holding that the cause was properly removed.[1] This Court granted certiorari.[2]

It is settled that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship. *Childress* v. *Emory*, 8 Wheat. 642; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Amory* v. *Amory*, 95 U. S. 186; *Blake* v. *McKim*, 103 U. S. 336; *American Bible Society* v. *Price*, 110 U. S. 61; *Continental Insurance Company* v. *Rhoads*, 119 U. S. 237. It was, however, held by the court below that this principle is inapplicable to a case, like the present, where the administrator sues not for the benefit of the estate, but of certain named bene-

[1] 247 F. (2d) 28.
[2] 283 U. S. 815.

ficiaries amongst whom the amount recovered must be divided. That court likened such a case to one where suit by the beneficiary is required to be brought in the name of a state, county, or official body, although such nominal plaintiff has no interest in the result and is not permitted to control the litigation (*McNutt* v. *Bland*, 2 How. 9; *Maryland* v. *Baldwin*, 112 U. S. 490); or to actions instituted by a next friend, where it has been held that the infant is the real party in interest, whose citizenship determines the question of diversity (*Voss* v. *Neineber*, 68 Fed. 947; *Blumenthal* v. *Craig*, 81 Fed. 320).

The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here, charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view. The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him.[4]

Under these circumstances the rule laid down in *Mexican Central Ry. Co.* v. *Eckman*, 187 U. S. 429, is applicable. That was an action in a federal court in Texas by a guardian, a citizen of that state, against a Massachusetts corporation, to recover for an injury to a minor which occurred in Mexico. A plea in abatement averred that the ward and his parents were citizens of Illinois and that the court was therefore without jurisdiction. This Court examined the state law and ascertained that it authorized a guardian to bring suit in his own name. It was held that his citizenship, not that of his ward, determined the right to resort to the federal court. At page 434 it was said:

"If in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the

[4] Ch. 3, Art. XXVII, §§ 824-825, Comp. Stat. Okla. 1921; *Sanders* v. *Chicago, R. I. & P. Ry. Co.*, 66 Okla. 313; *Aetna Casualty & Surety Co.* v. *Young*, 107 Okla. 151. Ch. 3, Art. V, § 211, Comp. Stat. Okla. 1921.

name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond."

See also *City of Detroit* v. *Blanchfield*, 13 F. (2d) 13.

It has been held that the same rule applies in the case of suits by administrators to recover for death by wrongful act, whether the statute provides that the amount recovered be for certain relatives of the decedent or be general assets of the estate. *Harper* v. *N. & W. R. Co.*, 36 Fed. 102; *Popp* v. *C. H. & D. Ry. Co.*, 96 Fed. 465; *C. H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918; *Bishop* v. *B. & M. R. R. Co.*, 117 Fed. 771; *Memphis St. Ry. Co.* v. *Bobo*, 232 Fed. 708.

The court below relied on *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445. That authority is not in point. It dealt with the question whether an administrator appointed in the District of Columbia could bring suit there for a death occurring in Maryland, —the latter's statute providing that such suit should be brought in the name of the state. It was held that the suit might be maintained, as the administrator would be required to make distribution of the amount recovered in accordance with the laws of Maryland. No question of a fraudulent attempt to avoid jurisdiction by reason of lack of diversity of citizenship arose or was considered in the case.

The respondents assert that the present case is taken out of the general rule by its peculiar facts, which it is alleged demonstrate that a fraud was perpetrated to avoid federal jurisdiction. They point out that after the widow in her capacity as administratrix had repeatedly failed to prevent the removal of her successive actions her attorney had her resign and nominate in her stead the petitioner, who did not know her, had not known the decedent, knew of no assets in Louisiana, and consented to be substituted for her as a favor to her attorney; that petitioner did not sign his own bond, did not come to the state of Oklahoma to be appointed, and upon his appointment at once named the widow as his state agent in Oklahoma. They concede, as they must, that as a non-resident he was qualified under the Oklahoma law if appointed by the pro-

bate court to act as administrator.[5] His appointment was regular and in accordance with the statutes and the decree of the probate court may not be collaterally attacked in the present proceeding (see *McGehee* v. *McCarley*, 91 Fed. 462; *American Car & Foundry Co.* v. *Anderson*, 211 Fed. 301). It is nevertheless insisted that if the petitioner's appointment was accomplished for the purpose of avoiding diversity of citizenship and consequent removal into the United States court, the parties to that proceeding,—the petitioner, the widow, and her attorney,—were in a conspiracy to defeat federal jurisdiction.

But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it. The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. While those cases involve a somewhat different situation,—that where a plaintiff joins defendants in order to avoid federal jurisdiction,—they are in principle applicable to the present case, where it is claimed a plaintiff was procured for the same purpose. It has been uniformly held that where there is a *prima facie* joint liability, averment and proof that resident and non-resident tort feasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court. *Illinois Central R. R.* v. *Sheegog*, 215 U. S. 308; *C. B. & Q. R. R. Co.* v. *Willard*, 220 U. S. 413; *C. R. I. & P. Ry. Co.* v. *Schwyhart*, 227 U. S. 184. The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in *Morris* v. *Gilmer*, 129 U. S. 315; *Lehigh Mining and Manufacturing Company* v. *Kelly*, 160 U. S. 327; *Lake County Commissioners* v. *Dudley*, 173 U. S. 243; *Wecker* v. *National Enameling*

[5] See the following sections of the Compiled Statutes Oklahoma 1921: 1141, 1153, 1159, 1188, 1189, Ch. 5, Art. III.

and Stamping Co., 204 U. S. 176; and *Wilson* v. *Republic Iron Co.*, 257 U. S. 92.

The case comes to no more than this: There being, under Oklahoma law, a right to have a non-resident appointed administrator, the parties in interest lawfully applied to an Oklahoma court, and petitioner was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as that of one of the defendants there was no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship.

We are of opinion that the petitioner's motion to remand the cause to the state court should have been granted. The judgment must be reversed and the cause remanded to the United States District Court with directions to set aside the judgment and remand the case to the state court.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.